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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LOUIE L. WAINWRIGHT,

Petitioner,

vs.

MICHAEL HUTCHINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

AND APPENDIX

BRIEF OF PETITIONER ON JURISDICTION

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QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS IN ITS INTERPRETATION OF ANDERSON V. HARLESS, U.S. ___, 103 S.CT. 276 (1982) AND PICARD V. CONNOR, 404 U.S. 270 (1971) HAS ABROGATED THIS COURT'S STANDARDS FOR DETERMINING WHEN A HABEAS CORPUS PETITIONER HAS "FAIRLY PRESENTED" TO THE STATE COURTS THE "S BSTANCE" OF H'S FEDERAL HABEAS CORPUS CLAIM, PARTICULARLY IN LIGHT OF A CONFLICT AMONG THE CIRCUITS AS TO WHAT STANDARDS SHOULD BE APPLIED IN DETERMINING WHETHER A CONSTITUTIONAL CLAIM HAS BEEN EXHAUSTED?

2. WHETHER A CLAIM THAT A PROSECUTOR'S COMMENTS IN CLOSING ARGUMENT WERE IMPROPER BECAUSE THEY WERE NOT BASED ON EVIDENCE BEFORE THE COURT AND THUS VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL, IS THE SUBSTANTIAL EQUIVALENT TO A CLAIM THAT THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES WAS VIOLATED?

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PREFACE

The Petitioner, Louie L. Wainwright was the Appellant in the Eleventh Circuit Court of Appeals and the Respondent in the United States District Court for the Southern District of Florida. The Respondent, Michael Hutchins, was the Appellee in the Eleventh Circuit Court of Appeals and the habeas petitioner in the United States District Court. For clarity, in this brief, the parties will be referred to as the State and the Defendant.[1]

The following reference is made in this brief:

[1]The only other interested party would be Jim Smith, Attorney General for the State of Florida.

(A) For the portions of the record below sufficient to show jurisdiction in this Court, which are contained in the Petitioner's Appendix and consists of pages A1-A195.

I

OPINIONS BELOW

The judgment and opinion of the Eleventh Circuit Court of Appeals is reported at Hutchins v. Wainwright, 715 F.2d 512 (11th Cir. 1983), and is contained in the State's Appendix at "A 3-A34." The opinion of the United States District Court for the Southern District of Florida, granting the petition for writ of habeas corpus, and the Report of the United States Magistrate, which was adopted in the District Court's opinion is contained in the State's appendix at "A37-A38" and "A47-A86 is unreported. The opinion of the United States District Court for the Southern District of Florida, dis-missing the Defendant's

first petition for writ of habeas corpus without prejudice for exhaustion of state remedies is contained in the State's Appendix at "A42-A46," and is also unreported. The per curiam affirmance without opinion of the Defendant's conviction and sentence is reported at Hutchins v. State, 349 So.2d 1237 (Fla. 3d DCA 1977) and is contained in the State's Appendix at "A87-A88."

II

JURISDICTION

On September 19, 1983, the United States Court of Appeals for the Eleventh Circuit, affirmed the United States District Court's granting of the Defendant's Petition for Writ of Habeas Corpus. The State petitioned for rehearing. The petition for rehearing was denied on November 2, 1983. (A35-A36). The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of Title 28 U.S.C. §1254(1), and Amendments VI and XIV of the United States Constitution.

III

CONSTITUTIONAL PROVISIONS AND STATUTES

The constitutional provisions and statutes controlling the disposition of this cause are lengthy. See Amendments V, VI, and XIV of the Constitution of the United States; Title 28, United States Code, Section 1257; Title 28, United States Code, Section 2254. The pertinent text of each, set out verbatim appears in the Appendix at pages A89-A93.

V1

STATEMENT OF THE CASE

This is a Petition for Certiorari from the opinion of the Court of Appeals for the Eleventh Circuit, in which the Court affirmed the granting of the Defendant's Petition for Writ of Habeas Corpus arising from his State convictions and sentences for armed robbery and assault with intent to commit second degree murder. Hutchins v. Wainwright, 715 F.2d 512, 514 (11th Cir. 1983). (A3-A34).

The charges against petitioner arose from a taxicab robbery on July 17, 1975. The only witness identifying petitioner as the robber was the driver. Petitioner's defense was misidentification.

There was no other corroborating testimony or evidence.

In his opening statement, the prosecutor proffered to the court that he did not intend to elicit the details of the conversations between the detective and this individual, but was going to tell the jury what the detectives did, based on any conversations they may have had with this unkown young black male. The prosecutor also advised the court that the officers received information from this individual under a promise not to reveal his name, and had declined to give the prosecutor any identifying information. The court ruled that the prosecutor could "inquire of the officer simply as a result of his

investigation what did he do." 715 F.2d at 514-515.

During direct examination of the detectives, testimony was elicited over the Defendant's objections, that the detectives had met with a young black male in the area where the incident occurred and that they later drove with him to the area, which was later revealed to be the Defendant's address. Id. at 515.

In his closing argument, the prosecutor made references to the contacts with the unidentified informant, as the following excerpts demonstrate:

> Mr. Goldstein: He testified he went to 1840 Northwest

60th Street, and you remember later on, that is where the Defendant lives.

He testified that he got out of the car, and he conducted an investigation on the scene there, that he went back to his office, and he made out this photo display, and put the photograph of Michael Hutchins in the photo display, and put the photograph of Michael Hutchins in the photo display, and the detective went to the hospital....

* * *

Then afterwards the detective got out a warrant; went to the State Attorney's Office; went to a judge; got a warrant for Michael Hutchins' arrest; went back to that address, and where was the address? '840 Northwest 60th Street.

* * *

The prosecutor went on to explain the absence of the unidentified witness by saying "[a] crime of this nature

creates fear" and that "people who have the fear do not want to get involved *** [t]hey do not want to physically face the accused." The prosecutor further urged the jury "not only to rely on what you have heard here," which was described as "the tip of the iceberg," but "to consider all the circumstances involved in this crime." 715 F.2d at 515.

The Defendant appealed his conviction to the District Court of Appeal, Third District, raising two grounds: (1) that "the trial court erred in excluding the testimony of the only defense witness on the ground of irrelevancy where the defendant proffered that this testimony was relevant to the identity of the perpetrator of the crime and would exculpate

the defendant, thereby violating the defendant's due process right to prepare and present a defense under the Sixth and Fourteenth Amendments to the constitution of the Untied States..." and (?) that "the trial court erred in allowing prosecutorial comments regarding the investigating officers encounters with an unidentified third person to pervade the entire trial, where the only purpose of this argument was to lead the jury to draw the impermissible inference that this third person had identified the defendant as the perpetrator of the charged crime, but was afraid to testify in court." (A144-A145). In support of this allegation of error, the Defendant cited state cases that admonished prosecutors from making comments that could

not be reasonably inferred from the evidence or which were inflammatory and calculated to raise passion or prejudice in the minds of the jury. (A162-A171). None of these cases contained any reference to any hearsay or confrontation clause claims.[2] The Defendant was

[2]Adams v. State, 192 So.2d 762 (Fla. 1966)(comments by prosecution that equated victim of homicide to wives and relatives of jurors, and that defense counsel's statements "perverted and distorted things" and "violated his oath as a lawyer and human being "were unduly prejudicial and constituted error); Goddard v. State, 143 Fla. 28, 196 So. 596 (1940) (prosecutor's statements that defendant was "low down scoundrel" and "skunk" and there has never been an ounce of remorse in the "no good black heart of that scoundrel"; although improper, held not reversible in light of overwhelming evidence); Johnson v. State, 88 Fla. 461, 102 So. 549 (1924)(prosecutor's reference to the defendant that he "went out there for what cats and dogs fight for," and "is a brute", were reversible error); Richardson v. State, 335 So.2d 835 (Fla. 4th DCA 1976)(prosecutor's remarks that he "could have brought in a lot of police

especially concerned with the prosecutor's explanation as to why the young black male did not testify, and his request to the jury to not only rely on what they heard, but to consider all the circumstances. (A168-A169).

The State in response, argued in its brief that the prosecutor properly argued

officers" and that case could have lasted longer constituted reversible error); James v. State, 334 So.2d 83 (Fla. 3d DCA 1976)(prosecutor's remark that pushers infest other individuals with his disease heroin although improper, was not so prejudicial as to require a mistrial); Silvestri v. State, 332 So.2d 351 (Fla. 4th DCA 1976)(prosecutor's remark that the state's key witnesses were "obviously able to convince the police of their truthfulness or they would have been the ones on trial was prejudicial error); Thompson v. State, 318 So.2d 549 (Fla. 4th DCA 1975)(prosecutor's comment, concerning additional witnesses who could have been called were prejudicial in that they lead the jury to believe that there was other evidence).

the facts which were established at trial and which were reasonably inferred from the facts established. The State cited to the portions in the transcript in which the two officers testified about their contact with the young black male. (A178-A181).

The Third District Court of Appeal, per curiam affirmed the Defendant's conviction, without an opinion. Hutchins v. State, 349 So.2d 1237 (Fla. 3d DCA 1977). Subsequently, Defendant filed a motion for post-conviction relief in the state trial court, alleging a violation of his state right to a speedy trial. The motion was denied by the trial court and no appeal was taken.

The Defendant then filed a pro se petition for writ of habeas corpus in the federal district court. In the petition, four issues were raised: (1) denial of a speedy trial; (2) exclusion of defense evidence; (3) suppression by the prosecution of favorable evidence; and (4) the unconstitutional admission of hearsay testimony. The trial court dismissed the petition without prejudice concluding that only two of the four grounds had been exhausted. One of the two grounds held to have been exhausted was the claim of the unconstitutional admission of hearsay testimony. (A43-A45). Hutchins v. Wainwright, supra at 517. The Defendant did not file any further motions or petitions in the state court.

The Defendant filed instead a second petition for writ of habeas corpus in the federal court. The efendant alleged three grounds for relief: (1) the trial court's denial of defense counsel's request to produce a witness (?) the unconstitutional admission of hearsay testimony; and (3) the unconstitutional failure of the prosecution to disclose evidence favorable to the defense. 715 F.2d at 517.

After a response by the State, which conceded that the first two claims had been exhausted, but not the third, the Defendant waived his claims of speedy trial and on the failure to disclose favorable defense evidence. The Defendant now with counsel, filed a

memorandum of law on the two claims which were alleged to be exhausted, and presented the claims to the federal court as follows:

> A. The exclusion by the trial court of relevant and material exculpatory evidence offered by petitioner, in violation of the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.
>
> B. The admission by the trial court of incriminating out-of court statements of an unidentified and undisclosed informant, in violation of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

715 F.2d at 518.

The State then filed a response to

this memorandum, alleging that its prior concession that the claim of unconstitutional admission of hearsay had been exhausted was erroneous. Id. The State asserted that not only was a confrontation clause claim never presented to the state appellate court, but neither was the claim framed in terms of admission of hearsay evidence.[3] Rather, the State alleged that only a fifth amendment due process claim of prosecutorial misconduct had been raised. (A101-A106). The claim was therefore either waived under state procedural rules or was unexhausted. 715 F.2d at 518.

[3]One of the grounds for the State's petition for rehearing in the Eleventh Circuit was the court's misstatement of the fact that the State had asserted that the Defendant had raised a hearsay claim, but not a confrontation clause claim. (A117-A121).

The magistrate concluded that the confrontation clause claim was properly before him and recommended granting the writ of habeas corpus on the grounds that the admission of the hearsay testimony and the prosecutor's comments in closing argument referring to the testimony about the anonymous informant violated the Defendant's rights under the confrontation clause of the Sixth Amendment. 715 F.2d at 518. (A61-A63). The district court adopted this recommendation. Id. (A37-A38).

The State appealed to the Eleventh Circuit Court of Appeals. The Court of Appeals affirmed holding that "the issue, as presented on direct appeal, albeit obliquely stated, did sufficiently alert

the state court to a confrontation issue." Hutchins v. Wainwright, supra at 519. Although, not condoning the matter in which the claim was presented to the state courts, and noting the inartful wording of his brief, the Eleventh Circuit held that the substance of the Defendant's claim was that the prosecution obtained an unfair advantage by effectively introducing into evidence the out-of-court statements of the unidentified informant, and relied upon those statements as evidence of guilt. Because this is what the confrontation clause was designed to prohibit, the substance of the claim had been presented to the state appellate court. Id.

The State filed for rehearing on the

grounds of misstatement of facts[4] and the improper application of this Court's opinions in Anderson v. Harless, __U.S. ___, 103 S.Ct. 276, (1982); Webb v. Webb, 451 U.S. 493 (1981), and Picard v. Connor, 404 U.S. 270 (1981). (A117-A121. Rehearing was denied (A35-A36) and the State moved for a stay of the mandate. The Eleventh Circuit granted the motion for state of the mandate, pending review in this Court. (A94-A95).

[4]See footnote 3, supra.

V

REASONS FOR GRANTING THE PETITION

For almost one hundred years, this Court has required that a State prisoner must normally exhaust available state remedies before a writ of habeas corpus can be granted by the federal courts.[5] In Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 1204 (1982), this Court held that this requirement, now codified in 28 U.S.C. §2254(b) provides a "straightforward exhaustion requirement," a "simple

[5]See Ex parte Royall, 117 U.S. 241 (1886); Ex parte Hawk, 321 U.S. 114 (1944); Picard v. Connor, 404 U.S. 270 (1971); Duckworth v. Serrrano, 454 U.S. 1, 102 S.Ct. 18 (1981).

and clear instruction to potential litigants" that before they bring any claims to federal court they should have first taken each claim to the state court. However, from a review of the opinion by the Court of Appeals in the instant case and of other circuit courts of appeal, it is clear that in actual practice the "simple and clear instruction" has often been ignored and the application of the exhaustion requirement has been less than "straightforward."[6] For this reason this Court should accept jurisdiction.

[6]See Daye v Attorney General of the State of New ork, 696 F.2d 186, 198 (2d Cir. 1982)(en banc)(Van Graafeiland, J. dissenting).

A.

WHEN HAS A FEDERAL HABEAS CORPUS PETITIONER "FAIRLY PRESENTED" TO THE STATE COURTS THE "SUBSTANCE" OF HIS FEDERAL HABEAS CORPUS CLAIM.

In Picard v. Connor, 404 U.S. 270, 276-277 (1971), this Court held that the principles of comity, require that a federal habeas petitioner provide the state courts with a fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim. A petitioner need not cite a "book and verse on the federal constitution," but the substance or the substantial equivalent of the federal claim must first be fairly presented to the state courts. Id. at 275, 277-278. In Stanley v. Illinois, 405 U.S. 645, 658

n.10, this Court looked to the method of analysis "to determine the substance of the claim. Ten years later, in Anderson v. Harless, __U.S.__, 103 S.Ct. 276, (1982), this court reaffirmed this principle, adding that "it is not enough that all the facts necessary to support the federal claim were before the State courts," or "that a similar state-law claim was made," Id. at 277. Furthermore, this Court doubted that "a defendant's citation to a state-court decision predicated solely on state law will be sufficient to fairly apprise a reviewing court of the potential federal claim merely because the defendant in the cited case advanced a federal claim. Id. at 278 n.3.

The circuit courts of appeal have interpreted these decisions in a variety of ways to determine whether the substance of a federal claim has been fairly presented to the state courts.

The First Circuit requires that the federal habeas corpus petitioner to have presented the state courts with all the facts and the same governing legal arguments, but allows some reformation of the claims so long as the effect is not to transform the claim or cast it in significantly different light.[7] The Second Circuit has adopted a more expansive interpretation of when the substance of a

[7]Williams v. Holbrook, 691 F.2d ^ (1st Cir. 1982); Domaingue v. Butterworth, 641 F.2d 8 (1st Cir. 1981); Fillipini v. Ristaino, 585 F.2d 1163 (1st Cir. 1978).

federal claim has been presented.[8] The Second Circuit adopted a four part test; whether the petitioner relied on pertinent federal cases employing a constitutional analysis· relied on state cases employing constitutional analysis in like fact situations: asserted the claims in terms so particular as to call to mind a specific right protected by the constitution: or alleged a pattern of facts that is well within the mainstream of constiutional litigation.[9]

[8]Daye v. Attorney General of the State of New York, supra.

[9]Interestingly, the Second Circuit in its en banc decision in Daye, rejected its prior decision in Gayle v. LeFebre, 613 F.2d 21 (2d Cir. 1980) which had imposed a requirement that the constitutional claim have been plainly labeled as such to the state court. Gayle v. LeFebre was cited with approval by this Court in Anderson v. Harless, __U.S.__, 103 S.Ct. at 277.

The Third Circuit has held that exhaustion requires not only the facts and the cases, but a focus on the constitutional claim, especially where the two issues have much in common and one may lie in the shadow of the other without being observed.[10] The Fifth Circuit recognizes that a petitioner has presented his claim to the state court if it is one that the courts have long been put on notice implicates federal constitutional rights.[11] The Sixth Circuit after this Court's decision in Anderson

[10] Hill v. Zimmerman, 709 F.2d 232 (3d Cir. 1983). Santana v. Felton, 685 F.2d 71 (3d Cir. 1982); Brown v. Cuyler, 669 F.2d 155 (3d Cir. 1982); Paulett v. Howard, 634 F.2d 117 (3d Cir. 1980); Zicarrelli v. Gray, 543 F.2d 466 (3d Cir. 1976).

[11] Blankenship v. Estelle, 545 F.2d 510 (5th Cir. 1977) cert.denied 444 U.S. 856 (1979).

v. Harless, supra, has held that a state will not be held to have perceived a constitutional claim each time a litigant cites analogous state law.[12]

The Seventh Circuit like the First Circuit requires the same legal theory, but with a minor variation.[13] However the Seventh Circuit requires that the petitioner inform the state of the factual basis and to have argued that the facts violated his constitutional rights.

[12]Haggins v. Warden, Fort Pillow State Farm, 715 F.2d 1050 (6th Cir. 1983). See also Steele v. Taylor, 684 F.2d 1193 (6th Cir. 1982); Webster v. Frey, 665 F.2d 88 (th Cir. 1981).

[13]United States ex rel Nance v. Fairman, 707 F.2d 936 (7th Cir. 1983); Holleman v. Duckworth, 700 F.2d 391 (7th Cir. 1983); Toney v. Franzen, 687 F.2d 1016 (7th Cir. 1982); Wilks v. Israel, 627 F.2d 32 (7th Cir. 1982).

However, because the federal courts must apply the exhaustion test with caution, novel claims, or ones that have a different focus, will not meet the exhaustion requirement. Furthermore an "oblique" reference to a constitutional issue will not have fairly presented the issue to the state court. [14]

Although the Eighth Circuit has recognized that the citation to a case presented on the same federal ground as that contained in the federal petition is sufficient for exhaustion,[15] . 1983); the court has also required that the

[14] Moore v. Duckworth, 581 F.2d 639, 642 (7th Cir. 1978) aff'd 443 U.S. 711 (1979).

[15] Hall v. Iowa, 705 F.2d 283 (8th Cir. 1983).

petitioner have cited either the constitution or the federal constitutional cases in order to present his claim to the state court.[16] The Ninth Circuit, while requiring the state to have the opportunity to pass upon the petitioner's constitutional claim, does not require for exhaustion that the state have had the opportunity to pass on the claim under the particular authorities advanced in the federal habeas court.[17] The Tenth Circuit, like the First Circuit will not find a claim to have been exhausted where the federal claim is significantly dif-
ferent and more substantial than the

[16]Nelson v. Solem, 714 F.2d 57 (8th Cir. 1983); Thomas v. Wyrick, 623 F.2d 411 (8th Cir. 1980); Conner v. Auger, 595 F.2d 407 (8th Cir. 1979).

[17]Hudson v. Rushen, 686 F.2d 826 (9th Cir. 1982).

claim presented in the state court.[18]

Finally, the Eleventh Circuit as expressed by the opinion in the instant case adopted an analysis for determining if the substance of the claim had been presented, similar to that of the Second Circuit. The Eleventh Circuit found the pattern of facts, as argued by the state prosecutor during his closing argument to have fallen within the mainstream of constitutional litigation of confrontation clause analysis, despite the failure of the petitioner to cite the sixth amendment or the confrontation clause and

[18]Jones v. Hess, 681 F.2d 687 (10th Cir. 1982).

the oblique nature in which the issue was raised.[19]

The finding by the Court of Appeals in the instant case that an "oblique' statement of the issues that is "inartfully worded" which does not cited to any constitutional provision or federal case, but cites only to a similar state law claim and cases, has fairly presented the substance of the federal constitutional claim to the state courts is an abrogation of this Court's decisions in Anderson v. Harless, supra and Picard v. Connor, supra. To hold that an "oblique" statement of the issue provided the state appellate courts with a "fair

[19]Hutchins v. Wainwright, 715 F.2d 512, 519 (11th Cir. 1983)(A30-A31).

opportunity" to apply controlling legal principles demeans the state appellate process by finding that the state appellate judges are less competent than federal judges to protect the constitutional rights of criminal defendants. See Stone v. Powell, 428 U.S. 465, 493-494 n.35 (1976).[20] The decision of the Court of Appeals imposes unnecessary burdens on its federal district courts and does not support the policy of federal-state comity, which underlies the doctrine of exhaustion.

In an analogous case involving this Court's jurisdiction under 28 U.S.C.

[20]See also Yackle, The Exhaustion Doctrine in a Federal Habeas Corpus: An Argument for a Return to First Principle, 44 Ohio State L.J. 393 (1983); Desmond, Federal Habeas Corpus Review of State Court Convictions - Proposals for Reform, 9 Utah L. Rev. 18 (1974).

§1257, this Court in Webb v. Webb, 451 U.S. 493 (1981) held:

> At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that these courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.
>
> 451 U.S. at 510. (Emphasis in original).

This view was reinforced a year later when this Court held that "it is not enough that all facts necessary to support the federal claim were before the State courts... or that a similar state law claim was made." Anderson v. Harless, _ U.S.__, 103 S.Ct. at 277.

An "oblique" statement of the issues that is "inartfully worded" can only leave a doubt that a federal claim was presented to the state court. "Book and verse" is not required but a "fair opportunity" is required. The Defendant's brief in the state appellate court did not give the State court a "fair opportunity" to review the confrontation clause issue and the Court of Appeals erred in concluding that he had done so.

The Court of Appeals abrogation of the exhaustion requirement as well as the apparent diversity and conflict among the circuits as to when a claim has been fairly presented to the state courts, warrants jurisdiction under this Court's rules and the substantive law. The

express purpose of the framers of the constitution in establishing this Court was "to secure the national rights [and] uniformity of Judgments." Letter from Chief Justice Hughes, March 23, 1937, quoting John Rutledge of South Carolina, reprinted in 81 Cong. Rec. 2814-2815 (1937). That supreme purpose of this Court would be properly met by the exercise of jurisdiction herein.

B

A CLAIM THAT A PROSECUTOR'S COMMENTS IN CLOSING ARGUMENT WERE IMPROPER BECAUSE THEY WERE NOT BASED ON EVIDENCE BEFORE THE COURT AND THUS VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL IS NOT THE SUBSTANTIAL EQUIVALENT TO A CLAIM THAT THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES WAS VIOLATED.

The Court of Appeals in the instant

case held that the Defendant's claim in state court that the prosecutor's comments in closing argument were improper because they were not based on evidence before the court and thus violated his right to a fair trial was the substantial equivalent to a claim that the Defendant's Sixth Amendment right to confront witnesses was violated. The court held that in effect the substance of the Defendant's claim was that the prosecution had obtained an unfair advantage by effectively introducing into evidence the hearsay out-of-court statements of the unidentified informant and then relied on those statements as evidence of the Defendant's guilt. Because this was exactly what the confrontation clause was designed to prohibit, the Court of

Appeals held that the Defendant had sufficiently alerted the state appellate court to a confrontation issue. Hutchins v. Wainwright, supra at 519. (A30-A31).

The function of the Confrontation Clause of the Sixth Amendment is to "advance a practical concern for the accuracy of the truth-finding process in a criminal trial by assuring that the 'trier of fact [has] a satisfactory basis for evaluating the truth'" of adverse evidence, either by personal confrontation at trial or some other constitutionally acceptable basis for determining the reliability of the evidence. Dutton v. Evans, 400 U.S. 74, 89 (1970) quoting California v. Greene, 399 U.S. 149 (1969). This Court has repeatedly stated

that although the Confrontation Clause and the common-law hearsay rule "stem from the same roots," Dutton v. Evans, supra at 86, "it is quite a different thing to suggest that the overlap is complete." California v. Green, supra at 155.

In analyzing whether hearsay testimony is admissible in light of the Confrontation Clause, "the prosecution must either produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant," and if unavailability is demonstrated, the statement must also bear adequate "indicia of reliability." Ohio v. Roberts, 448 U.S. 56, 65-66 (1980)(citations omitted). However,

a claim that the prosecutor based his closing argument on evidence not before the court, requires no such analysis. The test for determining the existence of prosecutorial misconduct regarding closing arguments is whether the remarks were improper and whether they prejudicially affected substantial rights of the defendant. See Berger v. United States, 295 U.S. 78, 84-89 (1934); United States v. Vera, 701 F.2d 1349, 1361 (11th Cir. 1983); United States v. Phillips, 664 F.2d 971, 1030 (5th Cir. 1981), cert. denied, __ U.S. __, 102 S.Ct. 2965 (1982). The actions of the prosecutor are not judged on whether the declarant was available to testify and if the statement was reliable.

This was the analysis urged by the Defendant to the state appellate court. The Defendant alleged that the trial court erred in allowing the prosecutor to comment on the investigating officers' testimony concerning encounters with an unidentified informant, where the only inference was that this informant had identified the Defendant as the perpetrator of the crime, but was afraid to testify in court. (A168-A169). In support of his argument, the Defendant cited state cases that admonished prosecutors from making comments that could not be reasonably inferred from the evidence or which was inflammatory and calculatd to raise passion or prejudice in the minds of the jury. (A166-A170). No reference was made to any hearsay

violations or confrontation clause claims. In fact the Defendant did not challenge the admission of the police officers' testimony.

The State's argument in reply revolved around the fact that the prosecutor was properly arguing the facts which were established at trial and which were reasonably inferred from the facts established. The state specifically cited to portions in the transcript in which the two officers testified about their contact with the young black male. If the Defendant had in fact argued that the prosecutor had obtained an unfair advantage by introducing into evidence the informant's out-of-court statements as evidence of the Defendant's guilt, then the state's argument to the appellate

court would have been absurd and a confession of error. Rather, the State's argument was a proper reply to the argument raised: that the prosecutor was not commenting on evidence not before the jury because the police officer's testimony concerning the unidentified informant had been admitted. The State was obviously not on notice that the Defendant was raising a violation of the confrontation clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.[21]

[21]A review of the Defendant's brief to the state appellate court shows that counsel for the Defendant was well aware of how to raise a federal constitutional issue. His first issue on appeal was framed in specific constitutional terms. (A146-A161). Furthermore, the cases relied on by the Court of Appeals to find a confrontation clause violation were in existence at the time of the state appellate brief and could have been cited .

The State submits that a claim that a prosecutor's comments in closing argument were improper because they were not based on evidence before the court, is not the substantial equivalent of a confrontation clause claim. This is especially so where although the facts are presented, the issue is framed in terms of prejudicial prosecutorial comments and not in terms of whether the testimony of the police officers was hearsay or violated his right of confrontation, or even whether the prosecutor's comments by themselves were hearsay or violated the Defendant's right to confrontation, and there is a total lack of citation to

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See, e.g., Favre v. Henderson, 464 F.2d (5th Cir.) cert.denied 409 U.S. 942 (1972); United States v. Ragano, 476 F.2d 410 (5th Cir. 1973).

federal constitutional provisions and authorities. Finally, because the "method of analysis" for the issues are different, a claim of prosecutorial comments not based on the evidence cannot be the substantial equivalent of a confrontation claim.[22] As such, it cannot be gainsaid, that the Defendant provided the state appellate court with a fair opportunity to review his constitutional claims. The

[22]It must also be pointed out that any violation of the confrontation clause, found by the Court of Appeals, would be irrelevant for this Court's determination of the issues in this Petition. As this Court stated in Duckworth v. Serrano, 454 U.S. 1, 102 S.Ct. 18 (1981), there is no clear violation exception to the exhaustion requirement. The Defendant, although possibily precluded from raising this issue on a motion for post conviction relief in the state trial court, he is not precluded from raising it as an issue in a petition for writ of habeas corpus in the state appellate court alleging ineffective assistance of appellate counsel.

Defendant's claims should have been rejected on the requirements of exhaustion and the State would therefore urge the Court to grant certiorari on this issue and reaffirm the principles of comity as espoused in this Court's prior decisions and which have been severely abrogated by the opinion of the Court of Appeals.

CONCLUSION

The State submits there is an issue of great public importance herein in the context of what standards are to be applied by the federal courts in determining whether a federal habeas corpus petitioner has fairly presented to the state courts the substance of his

federal habeas corpus claim. This Court has jurisdiction and should take jurisdiction over this matter of compelling national importance.

Respectfully submitted,

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LOUIE L. WAINWRIGHT,
Secretary, Florida Department
of Corrections,

Petitioner,

vs.

MICHAEL HUTCHINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-5256

D.C. Docket No. 82-420-CIV-ALH

MICHAEL HUTCHINS, #053170,

Plaintiff-Appellee,

versus

LOUIE L. WAINWRIGHT, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the

United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, AFFIRMED.

September 19, 1983

A3

Michael HUTCHINS, #053170,
Plaintiff-Appellee,

v.

Louis L. WAINWRIGHT, et al.,
Defendants-Appellants.

No. 83-5256.

United States Court of Appeals,
Eleventh Circuit.

Sept. 19, 1983.

Penny H. Brill, Asst. Atty. Gen., Miami, Fla., for defendants-appellants.

Elliot H. Scherker, Asst. Public Defender, Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

JAMES C. HILL, Circuit Judge:

Petitioner, Michael Hutchins, was found guilty of armed robbery and assault with the intent to commit second degree murder. The conviction arose from Mr. Hutchins' robbery of a taxicab driver on July 17, 1975. The pivotal issue at trial was the identity of the perpetrator. The taxicab driver did identify the petitioner as the man who had robbed him. The only other evidence against the pe tioner is the evidence which formed the basis of this appeal.

After the robbery occurred, two investigative police officers were sent to the scene of the crime. During their investigation, it appears that a young black male approached the officers and

informed them of who committed the crime and where the perpetrator resided. It was based on this information that the petitioner's photograph was incorporated into a spread and shown to the victim, leading to the defendant's being charged. However, the informant never appeared or testified at the trial. The two police officers who received the tip from the anonymous informant refused to identify the young man to either the prosecution or the petitioner.

At trial, during the opening statement, the prosecutor detailed for the jury the police investigation leading to the arrest of the petitioner. In this statement the prosecutor spoke of how

Detective Purdy had been contacted by a young man during a canvas of the area where the crime had occurred. Counsel for petitioner objected to this statement as referring to inadmissible hearsay. A bench conference was held where the court was informed that this young man had provided the police with information leading them to the residence of the petitioner. The prosecution further states that the two inves tigative police officers had refused to reveal the identity of the witness to either the prosecutor or the petitioner. The prosecutor maintained he would only inform the jury of "what the

detectives did" based on their conversations with the young man, but he would not adduce those conversations for the jury or the fact that young man had directed the officers to the petitioner's residence. The court ruled that the prosecutor would be permitted "to inquire of the officer simply as a result of his investigation what did he do." This questioning could refer to the presence of a bystander at the scene of the crime who left some kind of notation in the officers' car which prompted the police to further investigate the area.

During direct examination of the police officers, testimony was elicited, over objection, that the officers had met with a young male in the

vicinity of the robbery and that they had driven with the young man to the area of 1840 N.W. 60th Street (the petitioner's address). During closing argument, the prosecutor referred to the meeting between the police and the unidentified young man in the following manner:

> Mr. Goldstein: He testified he went to 1840 Northwest 60th Street, and as you remember later on, that is where the Defendant lives.
>
> He testified that he got out of the car, and he conducted an investigation on the scene there, that he went back to his office, and he made out this photo display, and put the photograph of Michael Hutchins in the photo display, and detective went to the hospital ....
>
> * * * * * * *

> Then afterwards the detective got out a warrant; went to the State Attorney's Office; went to a judge; got a warrant for Michael Hutchins' arrest: went back to that address, and where was the address? 1840 Northwest 60th Street ....

The prosecutor went on to explain the absence of the unidentified witness by saying "[a] crime of this nature creates fear" and that "poeple who have the fear do not want to get involved * * * [t]hey do not want to physically face the accused." The prosecutor then urged the jury "not only to rely on what you have heard here," which he described as "the tip of the iceberg," but "to consider all the circumstances involved in this crime." Petitioner asserts that as a result of the introduction into evidence of the substance of statements

attributed to an unidentified and undisclosed informant, and the reliance upon those statements as evidence of the guilt of the defendant, violated petitioner's right to confrontation under the sixth amendment to the United States Constitution.

In this case, it is clear from the record that an anonymous informant contacted the investigating officers and informed them that he knew who had committed the crimes. He told the officers the name and address of the assailant. However, for whatever reasons, this informant refused to testify at the defendant's trial and the investigating officers refused to name the informant to both the prosecution and the defense. The prosecutor's knowledge of this

information placed him in a difficult position. He zealously attempted throughout the trial to place into evidence that there existed an eyewitness informant. The trial court attempted to allow portions of this evidence in under the theory that the officers were entitled to testify as to their investigative efforts. However, in closing argument the prosecutor could no longer withstand the temptation to spell out for the jury the existence of this anonymous informant. In doing so, the prosecutor, in essence, informed the jury that there existed an eyewitness to this crime who accompanied the police to the residence of the defendant, but who refused to testify out of fear of retribution. This situation was aptly described by the

prosecutor as "a problem for everybody." Indeed, this court agrees that it is a problem of monumental concern when there is a witness who could assist the jury in its truthfinding process, but is afraid to testify. Reference to such a witness' statements, however, is inadmissible under the constitution. Here, the prosecution gave in to the temptation to provide for the jury this inadmissible evidence. This violated the defendant's right to confront the anonymous, non-testifying witness. The prosecutor violated the defendant's rights when he explained to the jury that this anonymous informant was afraid to testify, but that it was clear he was an eyewitness to the crime who had identified to the officers, the defendant as the perpetrator.

The sixth amendment right of an accused to confront the witnesses against him or her is a fundamental right. Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). Although we do not doubt the existence of this informant, he was never present, nor did he testify at the trial. The purpose of a defendant's right to confront a witness who testifies against him or her is not only to allow the defendant a chance at cross-examination, but to allow the jury to observe, and judge the credibility of the witnesses. The Supreme Court summarized the importance of the confrontation clause when it stated:

> The mission of the Confronta tion Clause is to advance practical concern for the accuracy of the truth-deter mining process in criminal trials by assuring that 'the

> trier of fact [has] a satis factory basis for evaluating the truth of the prior statement.'

Dutton, 400 U.S. at 89, 91 S.Ct. at 220, quoting California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 ('1969).

In analyzing a confrontation clause inquiry, the court must initially deter mine whether the out-of-court statements are within the hearsay rule. The trial court concluded and we agree that the statements elicited by the prosecutor of the investigating officers were hearsay. Although the officers' testimony may not have quoted the exact words of the informant, the nature and substance of the statements suggesting there was an eyewitness, and what he knew was readily inferred. See Favre v. Henderson, 464

F.2d 359, 362 (5th Cir.), cert. denied, 409 U.S. 942, 93 S.Ct. 235, 34 L.Ed.2d 193 (1972). Indeed, the violation became clear when the prosecutor in final argument, urged the jury to draw the inference that the witness knew who committed the crime but was afraid to come to court.

A finding that the statements were hearsay does not necessarily require a finding that the confrontation clause has been violated. See e.g., Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). To establish that the admission of the hearsay statements did not violate the confrontation clause, the prosecution must show that the out-of-court declarant is unavailable for trial and the statements bear a

sufficient indicia of reliability to provide the jury with an adequate basis for evaluating their truth. Ohio v. Roberts, 448 U.S. 56, 62-66, 100 S.Ct. 2531, 2537-39, 65 L.Ed.2d 597 (1980). In this case neither of the above requirements were established. The prosecution's only answer to the nonproduction of the informant was that the investigating officers refused to identify the witness. Additionally, the prosecution provided no basis no evaluating the credibility of the unnamed informant. Accordingly, having not met either requirement under Roberts, the admission of these statements violated the confrontation clause. See Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 ('972); Hoover v. Beto, 467 F.2d 516 (5th

Cir.), cert. denied, 409 U.S. 1086, 93 S.Ct. 703, 34 L.Ed.2d 673 (1972).

It is also a fundamental principle of trial practice that a prosecutor may not seek to obtain a conviction by presenting to the jury any evidence outside of the record. United States v. Vera, 701 F.2d 1349 (11th Cir.1983). The prosecutor clearly went outside the record of this case when he explained to the jury that there was an eyewitness informant who told the police that Hutchins was the perpetrator of the crime. The trial court concluded, and we agree, that the prosecutor's reliance on the hearsay testimony in closing argument was such that a reasonable juror could have concluded only that the informant identified Hutchins as the perpetrator of the

robber. The use of this testimony in closing argument and the easily drawn inferences therefrom, constituted hearsay and violated the confrontation clause, thereby denying Hutchins a fair trial. See Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). see also Favre v. Henderson, 464 F.2d 359, 362 (5th Cir.), cert. denied, 409 U.S. 942, 93 S.Ct. 235, 34 L.Ed 2d 193 (1972).

The prosecution submits that even if the admission of the challenged statements and his reliance upon them in closing argument was error, it was harmless because the petitioner was identified at trial by the victim of the robbery. The standards for determining whether a constitutional violation is harmless are well established. If there

is "a reasonable possibility that the evidence complained of might have contributed to the conviction," the error is not harmless. Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 17' (1963); see also Milton Wainwright, 407 U.S. 371, 372-73, 92 S.Ct. 2174, 2175-76, 33 L.Ed.2d ' (1972); Zilka v. Estelle, 529 F.2d 388, 390 (5th Cir.1976). Once a constitutional error is established, there is a presumption of prejudice and the burden is on the beneficiary of the error to prove beyond a reasonable doubt that the error did not contribute to the verdict. Zilka v. Estelle, 529 F.2d 388, 390 (5th Cir. 1976)· see Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

In this proceeding, the prosecution has not carried its burden of persuading this court that the error was harmless. Although there was one in court positive identification of the petitioner, this identification was vigorously challenged and somewhat equivocal. There is a total absence of any corroborative testimony of the identity of Hutchins.

However, we are also confronted with a procedural question of whether Hutchins sufficiently exhausted state remedies before filing this habeas action. After Hutchins was found guilty at trial, he filed a timely appeal to the Florida appellate court where his conviction was affirmed. Hutchins v. State, 349 So.2d 1237 (Fla.App.1977). The main issue presented on appeal to the Florida appellate

court, as stated in petitioner's brief, was as follows:

> Whether the trial court erred in allowing prosecutorial comments regarding the investigating officers' encounters with an unidentified third person to pervade the entire trial, where the only purpose of this argument was to lead the jury to draw the impermissible inference that this third person had identified the defendant as the perpe trator of the charged crime, but was afraid to testify in court.

Petitioner subsequently filed a pro se motion for post conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. This motion was denied and no appeal was taken. Petitioner then filed a pro se petition for writ of habeas corpus in the federal district court. Four issues were raised in this petition: (1) denial of a speedy

trial; (2) exclusion of defense evidence· (3) suppression by the prosecution of favorable evidence; and (4) the unconstitutional admission of hearsay testimony. The trial court dismissed the petition without prejudice concluding that only two of the four grounds raised had been exhausted. One of the two grounds held to have been exhausted was the claim of unconstitutional admission of hearsay testimony. Petitioner chose not to file any further petitions in state court. Rather, petitioner filed a second petition in the federal court alleging three grounds for relief: (1) the trial court's denial of defense counsel's request to produce a witness; (2) the unconstitutional admission of hearsay testimony; (3) the unconstitutional failure

of the prosecution to disclose evidence favorable to the defense.

In response to this petition, respondent filed a motion to dismiss, conceding that the first and second grounds presented by petitioner had been exhausted, but that the third ground had not been presented to the state court. Respondent further requested that petitioner state his intentions regarding the speedy trial claim which was presented in the first petition for habeas, but was not mentioned in the second petition.

The petitioner filed an election of remedies forever waiving his speedy trial claims. Petitioner then filed a memorandum of law in support of his petition, proceeding only on the two claims which

had been exhausted; (1) the unconstitutional admission of hearsay evidence; and (2) the trial court's denial of the production of witness. These two claims, as presented in petitioner's memorandum to the court were stated as follows:

> 8A. The exclusion by the trial court of relevant and material exculpatory evidence offered by petitioner, in violation of the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.
> B. The admission by the trial court of incriminating out-of-court statements an unidentified and undisclosed informant, in violation of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

In response to this memorandum, the respondent realized that the concession

that the claim of unconstitutional admission of hearsay had been exhausted was erroneous. Respondent contended that although it was clear from this final petition that Hutchins was raising a confrontation clause claim, he had never previously raised this claim in the state courts. Rather, petitioner had presented only a hearsay claim. The words confrontation clause had not been used by petitioner in any of his prior petitions in state or federal court and, therefore, according to the respondent this issue had either been waived or must be asserted in the state court prior to being considered by the federal court. See Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

The magistrate concluded that the confrontation clause claim was properly

before him and that the respondent "ha[d] failed to present an acceptable or justifiable excuse for its failure to previously assert these procedural claims." The magistrate further concluded that the admission of the hearsay testimony and the prosecutor's comments in closing argument referring to the testimony about the anonymous informant violated petitioner's rights under the confrontation clause of the sixth amendment. Accordingly, the magistrate recommended that the writ of habeas corpus be granted. The district court adopted this recommendation.

Respondent argues that the confron tation clause claim raised by Hutchins in his present petition was never presented to the Florida Courts and, therefore, the

issue had been either waived or must yet be exhausted under Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) and Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Respondent contends that the petitioner, on direct appeal, raised the issues of the admission of hearsay evidence and prosecutorial misconduct, not a sixth amendment confrontation clause claim.

The Supreme Court has mandated that when there has been a procedural default which bars state litigation of a constitutional claim, a state prisoner may not subsequently obtain habeas relief absent a showing of cause and actual prejudice. Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 1572, 71 L.Ed.2d 783 (1982); see Wainwright v. Sykes, 433 U.S. 72, 97

S.Ct. 2497, 53 L.Ed.2d 594 (1977). The failure to abide by a state procedural rule in preserving an error for appeal or in asserting that error on appeal bars federal habeas review of the claims not presented to the state courts. Ford v. Strickland, 696 F.2d 804, 816-17 (11th Cir.1983); see also Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). The issue presented to us is whether there existed a procedural default in this instance.

The trial record is replete with objections by defense counsel to the testimony regarding the out-of-court statements of the unidentified informant. Although the phrasing of the issue on direct appeal did not use the words "confrontation clause," the appeal clearly

presented the problem of allowing and urging the jury to infer that an unnamed non-testifying witness had identified the petitioner. The fifth circuit has held that objection on hearsay grounds is sufficient to present a state court with a subsequently raised federal constitution confrontation clause claim. Thomas v. Estelle, 582 F.2d 939, 941 (5th Cir.1978). The applicable law requires that a habeas corpus petitioner present "the substance of a federal habeas corpus claim" to the state courts. Pickard v. Connor, 404 U.S. 270, 278, 92 S.Ct. 509, 513, 30 L.Ed.2d 438 (1971). However, it is not required that the petitioner present book and verse on the federal constitution. Id. We are mindful of respondent's citation to Anderson v. Harless, ___U.S.___,

102 S.Ct. 276, 74 L.Ed.2d 3 (1982), for the proposition that the petitioner must couch his claim so as to allow a state court to rule on any applicable constitutional grounds. The Court in Harles, however, still focused on the premise that it is the substance of the claim that the court looks to in analyzing whether a federal claim has been voiced.

We concluded that the issue, as presented on direct appeal, albeit obliquely stated, did sufficiently alert the state court to a confrontation issue. The substance of petitioner's claim was that the prosecution obtained an unfair advantage by effectively introducing into evidence the out-of-court statements of the unidentified informant. The prosecution then relied upon those statements as

evidence of the petitioner's guilt. This is exactly what the confrontation clause is designed to prohibit. See California v. Green, 399 U.S. 149, 157-59, 90 S.Ct. 1930, 1934-35, 26 L.Ed.2d 489 (1970); Barber v. Page, 390 U.S. 719, 721-22, 88 S.Ct. 1318, 1320-21, 20 L.Ed.2d 255 (1968); United States v. Ragano, 476 F.2d 410, 414-15 (5th Cir.1973).

The Florida appellate court affirmed petitioner's conviction without any written opinion. It is, therefore, presumed that the court addressed petitioner's claim and rejected it. Smith v. Digmon, 434 U.S. 332, 333-34, 98 S.Ct. 597, 598-99, 54 L.Ed.2d 58 (1978); Carr v. State of Alabama, 586 F.2d 462, 464-65 (5th Cir 1978). We find that the confrontation issue was presented to the

state appellate court and the issue has been sufficiently exhausted.

Although we have concluded that petioner's federal habeas claim is properly before this court, we do not condone the manner in which it was presented. The mere raising of a hearsay claim is not the automatice equivalent of raising a confrontation clause claim. Although the two principles may have stemmed from the same roots, they have never been equated. See Dutton v. Evans, 400 U.S. 74, 86, 91 S.Ct. 210, 218, 27 L.Ed.2d 213 (1970); United States v. Thevis, 665 F.2d 616, 632 (5th Cir. Unit B. 1982). Exhaustion of state remedies is not simply a procedural mechanism for determining a state prisoner's ability to enter the federal court system. Rather, exhaustion was

designed to ensure that state courts have the initial opportunity to determine a defendant's rights under both state and federal law. See Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). The state possesses the primary authority to define and enforce criminal laws, as well as the responsibility of vindicating constitutional rights. Federal intrusion into the state court system frustrates the State's power to punish offenders in accordance with the law. Id. 102 S.Ct. at 1571; see Schneckloth v. Bustamonte, 412 U.S. 218, 263-65, 93 S.Ct. 2041, 2066-67, 36 L.Ed.2d 854 (1973)(Powell, J., concurring). Accordingly, when a criminal defendant perceives a constitutional error during the course of the trial, it is defense

counsel's responsibility to raise the error both at trial and on appeal in clear and forthright terms thereby alerting the state to the perceived error.

It is this court's conclusion that petitioner did sufficiently alert the state court to his confrontation clause claim, despite the inartful wording of his brief. Because we conclude that this case is properly before us and because there was a clear violation of peti tioner's rights to confrontation, we AFFIRM the grant of the writ by the trial court.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-5256

MICHAEL HUTCHINS,

Plaintiff-Appellee,

versus

LOUIE L. WAINWRIGHT,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING

(NOV 2 1983)

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

JAMES C. HILL
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-0420-CIV-JE

MICHAEL HUTCHINS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, as Secretary, Department of Corrections, State of Florida,

Respondent.

ORDER AND JUDGMENT

For the reasons stated in the Report of the Magistrate, and upon review of the file, it is now ORDERED:

That the Writ of Habeas Corpus is granted, and petitioner is discharged from custody unless the State of Florida conducts a new trial within sixty (60) days from the date of this Order.

In Miami, Florida, this 1 day of April 1983.

ALCEE L. HASTINGS
UNITED STATES DISTRICT JUDGE

Copies to:

Elliot H. Scherker
Assistant Public Defender
1351 NW 12th Street
Miami, FL 33125

Penny H. Hershoff
Assistant Attorney General
401 NW Second Avenue
Miami, FL 33128

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-420-Civ-ALH

MICHAEL HUTCHINS,

Petitioner,

-vs-

ORDER
DENYING STAY

LOUIE L. WAINWRIGHT,
as Secretary, Department
of Corrections,
State of Florida,

Respondent.

_____/

THIS CAUSE comes before the Court upon Respondent's Motion for a stay of further proceedings in this cause pending resolution of the appeal which has been filed with the United States Eleventh Circuit Court of Appeals, or alternatively for an enlargement of the time within

which the State of Florida must retry the Petitioner.

Having review the record in this case, having considered Respondent's Motion, and being otherwise duly advised in the premises, it is hereby.

ORDERED AND ADJUDGED that Respon dent's Motion for Stay of Further Pro ceedings Pending Appeal is DENIED. The Court will, however, allow the State of Florida ninety (90) days from the date of this Order within which to retry the Petitioner.

DONE AND ORDERED in Chambers this 18th day of April, 1983.

ALCEE L. HASTINGS
ALCEE L. HASTINGS
UNITED STATES DISTRICT JUDGE

Copies furnished counsel:
Elliot Scherker
Penny Hershoff Brill

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-3264-CIV-NCR

MICHAEL HUTCHINS,	:	
Petitioner,	:	
-vs-	:	ORDER OF DISMISSAL
M. K. SAWYER,	:	
Respondent.	:	
	:	

Michael Hutchins has filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Section 2254, attacking a conviction for robbery and of committing assault with the intent to commit second degree murder entered on April 23, 1976 after a jury trial in Case No. 75-7951 in the Circuit Court of the Eleventh Judicial Circuit, at Dade County. Hutchins is currently serving a twenty

(20) year term on the robbery conviction and a ten (10) year term on the assault conviction, the latter sentence to run consecutively with the sentence imposed for robbery. Hutchins is incarcerated at the Brevard Correctional Institutional, at Sharpes, Florida.

For its consideration with this petition, the Court has the Respondent's response to an order to show cause, the briefs filed on appeal, and a transcript of the jury trial.

Hutchins presents four grounds for relief in this petition, as follows:

1. The denial of the right to a speedy trial.

2. The conviction was obtained by the unconstitutional failure of the court to disclose evidence favorable to the defendant.

3. The conviction was obtained by the unconstitutional failure

of the prosecution to disclose evidence favorable to the defendant.

4. The conviction was obtained by the court's unconstitutional act of letting hearsay evidence in, which was only facorable to the prosecution.

Hutchins raised the substantial equivalent of numbered issues 2 and 4 on direct Appeal to the Third District Court of Appeal of Florida which confirmed his conviction. Hutchins v. States, 349 So.2d 1237 (Fla. 3d DCA, 1977). A subsequent state motion to vacate raised issue 1, the denial of the right to a speedy trial. But Hutchins failed to appeal the denial of the motion to vacate to any state appellate court.

It is evident that although Hutchins has exhausted state remedies as to two of the four issues raised in the petition,

he has not exhausted his state remedies as to issue number 1, the denial of the right to a speedy trial, nor issue number 3, the failure of the prosecution to disclose evidence favorable to the defendant.

To avoid piecemeal litigation, the Fifth Circuit Court of Appeal has consistently required that state remedies be exhausted as to all issues raised in a federal habeas corpus petition. Burroughs v. Wainwright, 454 F.2d 1165 (5th Cir. 1973). Meachem v. Beto, 451 F.2d 187 (5th Cir. 1971); Garrett v. State of Texas, 435 F.2d 709 (5th Cir. 1970).

In light of the above, this Petition for Habeas Corpus is DISMISSED without prejudice so that Petitioner may exhaust

his state remedies: and, it is hereby so,

DONE AND ORDERED at Miami, Florida, this 24th day of Sept, 1979.

NORMAN C. ROETTGER
UNITED STATES DISTRICT JUDGE

cc: Mr. Michael Hutchins, #053170
P. O. Box 340
Brevard Correctional Institution
Sharpes, Florida 32959

Ms. Maragrita Esquiroz
Assistant Attorney General
401 N. W. 2nd Avenue,
Suite 820
Miami, Florida 33128

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 82-0420-Civ-JE

MICHAEL HUTCHINS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, as Secretary, Department of Corrections, State of Florida,

Respondent.

REPORT OF UNITED STATES MAGISTRATE

In March, 1982, Michael Hutchins filed a pro se Petition for Writ of Habeas Corpus, 28 U.S.C. 2254[1].

Petitioner alleges that his custody, under a judgment by the Circuit Court of the Eleventh Judicial Circuit of Florida,

[1]Thereafter the cause was re-assigned to me, and Mr. Elliot Scherker entered his appearance as petitioner's counsel.

on April 15, 1976, for the offenses of armed robbery and assault with intent to commit second-degree murder, is unlawful under the Constitution of the United States. Currently in the custody of resspondent, he is serving consecutive sentences of 20 and 10 years' imprisonment.

I make this Report pursuant to 28 U.S.C. §636(b)(1)(B), and Rules 8 and 10 of the Rules Governing Section 2254 Cases in United States District Courts.

Petitioner has raised two issues: 1) that the exclusion by the state trial court of evidence offered by petitioner at trial violated the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amend ment; and 2) that the admission into

evidence of the substance of incriminatory statements attributed to an unnamed informant, and the reliance by the prosection upon those statements as evidence of guilt, violated the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. In my view the first ground does not state a claim upon which petitioner should receive habeas corpus relief[2] . However, I find that petitioner is entitled to relief on the second ground: the introduction into evidence of, and argument upon, out-of-court statements attributed to an

[2]The Court thereby makes no finding that the evidence was properly excluded. On re-trial, the same proffer may well receive admission. I simply decline to find that its exclusion was error of Federal Constitutional magnitude.

unidentified informant.

PROCEDURAL ISSUES

Petitioner was found guilty by a jury of armed robbery and assault with intent to commit second-degree murder on April 15, 1976. The state trial court adjudicated guilt on that date, and imposed sentence on April 23, 1976. A timely appeal was taken to the Florida Third District Court of Appeal which issued it decision, affirming the judgment and sentence without a written opinion, on August 9, 1977. Hutchins v. State, 349 So.2d 1237.

On December 12, 1977, Petitioner filed a pro se motion for post-conviction relief, Rule 3.850 of the Florida Rules of Criminal Procedure. The motion was denied on January 7, 1978. No appeal was

taken. Petitioner thereafter filed a pro se petition for writ of habeas corpus in this Court. It was denied without prejudice on September 24, 1979. The present petition was filed on March 2, 1982.

Respondent's memorandum of law filed on November 22, 1982, asserted that petitioner's confrontation claim is not properly before this Court. Specifically, respondent claims that this issue was not properly presented to the state appellate court on petitioner's direct appeal. From this premise, respondent argues that petitioner is either barred from presenting this issue on federal habeas corpus due to a state procedural default, or has not fully exhausted his state remedies. The parties agree that petitioner cannot re-assert his confrontation claim in the

state courts, becasue the issue is, under Florida law, properly cognizable on direct appeal and therefore not properly raised in state post-conviction proceedings. See Adams v. State, 380 So.2d 423 (Fla. 19°^). Accordingly, the claim must be deemed "exhausted", whether or not it was actually presented to the state courts in the first instance. Engle v. Isaac, __ U.S. ____, 102 S.Ct. 1558, 1570 n.28 ('982).

The threshhold question, then, is whether petitioner should, as respondent claims, be forever barred from invoking the habeas corpus jurisdiction of this Court. The Court finds that the confrontation claim is properly presented here for two reasons· ¹) respondent is estopped from seeking a dismissal on this

ground; 2) the claim was sufficently presented to the state courts to satisfy the requirements of Isaac, and Wainwright v. Sykes, 433 U.S. 72 (1977).

In his first petition in this Court, Case No. 78-3274-Civ-NCR, petitioner raised four claims: 1) the denial of a speedy trial; 2) the failure of the state trial court to disclose favorable evidence; and 4) the admission of hearsay evidence at his trial.

The order of dismissal entered by Judge Roettger on September 24, 1979, states in pertinent part:

> Hutchins raised the substantial equivalent of numbered issues 2 and 4 on direct appeal to the Third District Court of Appeal of Florida which [affirmed] his conviction. A subsequent state motion to vacate raised issue 1, the denial of the right to a speedy trial. But

> Hutchins failed to appeal the denial of the motion to vacate to any state appellate court.
>
> It is evident that although Hutchins has exhausted state remedies as to two of the four issues raised in the petition, he has not exhausted his state remedies as to issue number 1, the denial of the right to a speedy trial, nor issue number 3, the failure of the prosecution to disclose evidence favorable to the defendant.

The Court accordingly dismissed the petition without prejudice.

Petitioner did not file any further motions or petitions in the state courts. The present petition, filed on March 2, 1982, raised three claims: 1) the exclusion of proferrred defense testimony by the state trial court; 2) unconstitutional admission of hearsay testimony; and 3) the failure of the prosecution to

disclose favorable evidence. Respon dent's motion to dismiss the petition on July 10, 1982, conceded that petitioner had raised "the [substantial] equivalent of two of the [three] grounds which he presently raises in this federal habeas corpus petition, that is, ground (1), the exclusion of a [defense] witness on the basis that his testimony was irrelevant, and ground (2), the admission of hearsay evidence at his trial." Respondent sought a dismissal without prejudice on the ground that petitioner had not presented the third claim (failure to disclose favorable evidence) to the state courts, and further sought a declaration from petitioner regarding his intentions as to his speedy trial claim, raised in his first petition but not by the second.

The Court thereafter permitted state appellate counsel for petitioner to enter an appearance on his behalf, and directed counsel to file a statement of the grounds upon which petitioner intended to proceed in this Court. Counsel thereafter filed a notice of election of remedies, advising the Court that petitioner would proceed upon the two grounds which had been presented to the state courts, and would abandon the remaining claims alleged in the two petitions.

In a responsive memorandum of law filed on November 22, 1982, pursuant to the Court's Order of October 25, 1982, respondent first raised the two procedural claims noted above. The Court finds that respondent has failed to present an acceptable or justifiable excuse

for its failure to previously assert these procedural claims.

Both the exhaustion doctrine embodied in 28 U.S.C. §2254(d) and the waiver rule of Isaac and Sykes are policy rules, grounded upon well recognized consideration of federal-state comity. See Engle v. Isaac, supra, at 1571-72; Galteiri v. Wainwright, 582 F.2d 348, 354 (5th Cir. 1978). It is accordingly well established that a custodian in a habeas corpus proceding may be estopped from asserting, or be held to have waived, such procedural objections to the consideration of the merits of a prisoner's claims. See Messelt v. Alabama, 595 F.2d 247, 250 (5th Cir. 1979); Houston v. Estelle, 569 F.2d 372, 376 (5th Cir. 1978); Collins v. Estelle, 474 F.2d 988, 99 (5th Cir. 1973).

The Court finds that the Order of dismissal entered by Judge Roettger on September 24, 1979, constitutes a final judicial determination that the substantial equivalent of the present confrontation claim was presented to the state courts and that state remedies were properly exhausted as to this claim. The Court therefore concludes that respondent is estopped by that ruling from relitigating this issue in this proceeding under the doctrine of collateral estoppel, as applied in both civil and criminal cases. See Ashe v. Swenson, 397 U.S. 436, 443-44 (1970). Aerojet-General Corporation v. Askew, 511 F.2d 710, 715 (5th Cir. 1975), cert.denied, 423 U.S. 837 (1975); McDonald v. Wainwright, 493 F.2d 204, 207 (5th Cir. 1974) Rankin v. State

of Florida, 418 F.2d 482, 486 (5th Cir. 1969), cert.denied, 397 U.S. 1039 (1970).

The Court further finds that the failure of respondent to raise these defenses prior to the belated assertion in this proceeding, after petitioner had justifiably and detrimentally relied upon the concession of respondent in his initial motion to dismiss that the substantial equivalent of the confrontation claim had been presented to the state courts, both equitably estops respondent from raising his procedural defense, and constitutes a waiver. See LaRoche v. Wainwright, 599 F.2d 722, 724 (5th Cir. 1979). The Court therefore concludes that respondent is barred from seeking a dismissal of the present petition.

The Court further finds that the

substantial equivalent of the confrontation claim was presented to the state courts, both at trial and on appeal. The trial record is replete with objections by defense counsel to testimony regarding the out-of-court statements of the un identified informant. The brief filed for petitioner in the state appellate court recites these objections. The issue presented on direct appeal to the state appellate court was:

> Whether the trial court erred in allowing prosecutorial comments regarding the investigating officers' encounters with an unidentified third person to pervade the entire trial, where the only purpose of this argument was to lead the jury to draw the impermissible inference that this third person had identified the defendant as the perpetrator of the charged crime, but was afraid to testify in court.

The Fifth Circuit has held that

obections on hearsay grounds are sufficient to present to the state courts a subsequently-raised federal constitutional confrontation claim. Thomas v. Estelle, 582 F.2d 939, 941 (5th Cir. 1978). Applicable law requires a habeas corpus petitioner to present "the substance of a federal habeas corpus claim" to the state courts but does not require the citation of "'book and verse on the federal constitution.'" Picard v. Connor, 404 U.S. 270, 278 (1971)(citations omitted). The recent decision in Anderson v. Harles, _ U.S. __, 102 S.Ct. 276 (1982), upon which respondent relies, reaffirms the principle that the substance of a federal habeas corpus claim must first be presented to state courts.

I find that the substance of the

present claim was presented to the state courts by petitioner, both at trial and on appeal. The essence of the claim is that the prosecution obtained an unfair advantage by effectively introducing into evidence the out-of-court statements of the unidentified informant as ostensible non-hearsay, and then relying upon those statements as evidence of Petitioner's guilt. This is precisely what the Confrontation Clause is designed to prohibit. See California v. Green, 399 U.S. 149, 157-59 (1970). Barber v. Page, 390 U.S. 719, 721-22 (1968); Douglas v. Alabama, 380 U.S. 415, 418-19 (1965); United States v. Ragano, 476 F.2d 410, 414-15 (5th Cir. 1973). Favre v. Henderson, 464 F.2d 359, 361-64 (5th Cir. 1972); cert.denied, 409 U.S. 942 (1972).

The state appellate court affirmed petitioner's conviction without written opinion. It is therefore conclusively presumed that the court addressed his claim and rejected it. Smith v. Digmon, 434 U.S. 332. 333-34 (1978); Carr v. State of Alabama, 586 F.2d 462, 464-65 (5th Cir. 1978); Leslie v. Wainwright, 511F.Su pp. 753, 755 (M.D. Fla. 1981). I accordingly find that the state appellate court approved the prosecutor's reliance upon out-of-court statements as substantive evidence of guilt, rendering the present claim properly brought in federal habeas corpus.

Moreover, I find that the state court's approval of the prosecutorial tactics employed in this case obviates any need for petitioner to re-exhaust his

confrontation claim and eliminates any procedural bars, even were his earlier failure to cite applicable constitutional provisions given any weight.

While Engle v. Isaac, supra, holds that perceived futility of presenting a claim to the state courts will not excuse a failure to do so, 102 S.Ct. at 1572-73, the subsequent decision of the Fifth Circuit in Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982), rendered on a remand for reconsideration in light of Isaac in Wainwright v. Henry, __ U.S. _, 102 S.Ct. 2922 (1982), holds that the failure of counsel to repeatedly press a claim which a state court has rejected in the subject litigation does not bar federal intervention. 686 F.2d at 314 n.3. The Court finds that it would have been

futile, within the meaning of Henry, for counsel to have asserted error in the introduction of ostensible non-hearsay testimony before a court which approved the prosecutor's reliance upon that testimony as evidence of guilt. Thus, I find that Isaac does not bar consideration of petitioner's claim in this proceeding.

I accordingly conclude that petitioner's claim, first filed in this Court in 1978, is properly before the Court. Neither law nor equity justifies barring petitioner from receiving consideration of his constitutional claims.

THE CONFRONTATION CLAIM

The facts upon which the confrontation claim is based are reflected in the trial transcript, which is before the

Court. There is no dispute between the parties over the historical facts in this case. The charges against petitioner arose from a taxicab robbery on July 17, 1975. The only witness identifying petitioner as the robber was the driver. Petitioner's defense was misidentification; he challenged the in-court identification by the driver at trial on the grounds that the driver had initially identified petitioner in a photographic lineup while the driver was hospitalized, suffering from wounds inflicted during the crime, and under sedation.

In his opening statement, the prosecutor referred to an encounter between one of the investigating officers, Detective Purdy, and a young black male. Counsel for petitioner objected on

hearsay grounds. The prosecutor proferred to the court that he did not intend to elicit the details of the conversations between the detective and this individual, but was "going to tell the jury here what the detectives did, based on any conversations they may have had with this unknown young black male." The prosecutor also advised the court that the officers received information from this individual under a promise not to reveal his name, and had declined to give the prosecutor any identifying information.

The court ruled that the prosecutor could advise the jury of the existence of the individual and the actions of the officers. The prosecutors continued his opening statement, and told the jury that

the officers had further contacts with the unidentified individual, had gone to a particular address, and had prepared a photographic array from which the victim identified petitioner. The court denied a motion for mistrial by counsel for petitioner, although advising the prosecutor that he had acted "contrary to the Court's previous ruling as to what you are able to go into."

The two detectives, Purdy and Shipes, testified at trial to their contacts with the unidentified informant. Purdy testified that he and Shipes had been investigating the area where the in cident ocurred when they were approached by a young black male with whom they

conversed. Over renewed objections by counsel, the court permitted the witness to testify that this individual had placed a piece of paper in the police vehicle. A subsequent motion for mistrial was denied by the court.

Detective Shipes then testified, over objection of counsel, that he found the piece of paper and returned to the police station, where he made a telephone call. Shipes further testified that he and another officer met with the unidentified black man on the following day, drove with him to the area of 1840 Northwest 60th Street, returned to the police station, obtained a photograph of petitioner, and prepared the photographic lineup for the victim. The detective testified he subsequently obtained a

warrant for petitioner's arrest, and arrested him at his home. Renewed objections to this testimony were overruled, and motions for mistrial were denied by the trial court.

In his closing argument, the prosecutor made extensive references to the contacts with the unidentified informant, as the following excerpts demonstrate:

> Mr. Goldstein: He testified he went to 1840 Northwest 60th Street, and as you remember later on, that is where the Defendant lives.
>
> He testified that he got out of the car, and he conducted an investigation on the scene there, that he went back to his office, and he made out this photo display, and put the photograph of Michael Hutchins in the photo display, and the detective went to the hospital....
>
> * * *

Then afterwards the detective got out a warrant; went to the State Atorney's Office; went to a judge· got a warrant for Michael Hutchins' arrest; went back to that address, and where was the address? 1840 Northwest 60th Street.

* * *

A crime of this nature creates fear; fear of the victim ... . [B]ut crimes of this nature create violent fear and tremendous emotions for people who are involved and see these types of crimes. Especially, persons who might know persons that commit crimes like this. The become very fearful of what people that commit crimes of this type of nature might do to them, if they crossed them. It creates fear in the neighborhood· people that have to live with this violent nature: people who have the fear do not want to get involved with police officers, they do not want to cooperate with police offi cers, they certainly do not

> want to cooperate with police officers, and if they cooperate with police officers, they certainly do not want to physically face the accused; the Defendant. It creates serious problems for everybody.

Petitioner asserts that the police officers' testimony introduced the substance of the informant's statements into evidence. The informant was thus a witness against him, and his inability to confront and cross-examine the informant violated the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. Petitioner also asserts that the closing argument of the prosecutor further prejuiced him at trial, as the prosecutor urged the jury to accept as true the out-of court statements of the witness because of his attributed fear of coming forward.

I find that these contentions have merit. The introduction of the substance of the informant's statements, and the manner in which these were used at trial, violated the Sixth and Fourteenth Amendments.

The first aspect of a confrontation inquiry is whether out-of-court state ments are within the hearsay rule. I find that the prosecution, despite eschewing an intent to elicit the statements of the informant, succeeded in presenting the statements to the jury. The police officers testified, in essence, that they had been contacted by the informant, that they had a conversation with him, and that as a result of this conversation they drove to a specific address, 1840 Northwest 60th Street,

where they obtained additional information and then prepared a photographic lineup which included a picture of petitioner. One of the officers further testified that he had thereafter obtained an arrest warrant, and had arrested petitioner at the same location, 1840 Northwest 60th Street. I find that a reasonable juror could only have concluded that the informant identified the petitioner as the perpetrator of the robbery, and directed the officers to his home.

This testimony was hearsay. Favre v. Henderson, 464 F.2d 359 (5th Cir. 1972), cert.denied, 409 U.S. 947 (1972). In Favre, as in the present case, the prosecution presented testimony of a police officer who investigated the robbery with which the defendant had been

charged; the trial court permitted the officer to testify that he had first sought to arrest the defendant after having had contact with two confiden tial informants. As in the present case, the witness in Favre did not quote any statements made by the informants. Id. at 360-61.

The Fifth Circuit held that the testimony was hearsay:

> Whether offered by the prosecution to establish identifi cation, guilt, or both, the testimony, when considered in light of its logical inferences, is hearsay. 'Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters as serted therein, and thus resting for its value upon the credibility of the out-of-court asserter.' Although the officer never testified to the exact statements made

> to him by the informers, the nature of the statements .. was readily inferred.
>
> [citations omitted]

464 F.2d at 362.

A finding that the testimony in this case was hearsay does not require a finding that the Confrontation Clause was violated. See e.g., Dutton v. Evans, 400 U.S. 74, 89 ('97^). That Clause imposes two restrictions on the admission of hearsay testimony: 1) the prosecution must establish that the out-of-court declarant is unavailable for trial; and 2) if this predicate is satisfied, it must be demonstrated that the statements bear sufficient "indicia of reliability" so as to provide the jury with an adequate basis for evaluating its truth. Ohio v. Roberts, 448 U.S. 56, 62-66

(1980). I find that the record in this case demonstrates that neither of these requirements was met, and accordingly that the introduction of the hearsay testimony violated the Confrontation Clause.

First, there was no showing that the witness was unavailable. The prosecutor's only statement was that the police officers were unwilling to identify the witness. That the prosecutor did not consider these statements conclusive is established by his representation to the court that counsel for petitioner had the right to seek disclosure of the witness. The state attorney's power to compel production of such evidence is provided by Florida law. See Fla.Stat. §27.04, (1981). There is no showing on this

record that the officers would have resisted either the subpoena power of the prosecutor or a direct order of the trial court. Accordingly, I find that the prosecution failed to sufficiently demonstrate that the witness was unavailable, and the introduction of the out-of-court statements through the police officers violative the Confrontation Clause. See Mancusi v. Stubbs, 408 U.S. 204, 212-216 (1972). Barber v. Page, 390 U.S. 719, 722-724 (1968).

I also find that the record is devoid of any "indicia of reliability" of the statements, even if the unavailability of the witness had been demonstrated. The law requires that such indicia appear of record. Hoover v. Beto, 467 F.2d 516, 533 (5th Cir. 1972),

cert.denied, 409 U.S. 1086 (1972). No basis for evaluating the credibility of the unidentified informant appears on this record. The conclusion of the Court in Favre v. Henderson, supra, is directly applicable:

> The mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.' In the present case, testimony was admitted which led to the clear and logical inference that out-of-court declarants believed and said that Favre was guilty of the crime charged. The informers were not identified and were not subject to cross-examination. The trier of fact had absolutely no 'satisfactory basis for evaluating the

truth of the prior state-
ment.'

[citations omitted]

464 F.2d at 364.

I find this holding to be controlling in the present case.

In this proceeding, respondent's last line of defense is that any error was harmless, because petitioner was identified at trial by the victim of the robbery. The standards for application of the constitutional harmless-error rule are well established. See Milton v. Wainwright, 407 U.S. 371, 372-73 (1972); Harrington v. California, 395 U.S. 250, 253-54 (1959); Zilka v. Estelle, 529 F.2d 388, 390 (5th Cir. 1976). Blackburn v. Cross, 510 F.2d 1014, 1019 (5th Cir. 1975), cert.denied, 421 F.2d 970 (1975). Applying these standards, the Court finds

that the error in this case was not harmless.

In Favre v. Henderson, supra, in which there was also one positive in-court identification (bolstered by three other identification witnesses, who pointed the defendant with varying degrees of certainty), the court rejected a harmless-error assertation as follows:

> Considering the disputed testimony in context, we cannot conclude that its admission was harmless 'beyond a reasonable doubt.' The testimony, with its inference on the issues of identification and built, may well have tipped the scales toward a guilty verdict. Without the disputed testimony, the prosecution had a questionable case, based as it was on two tentative identifications based on build, hair color, and complexion, one dubious positive identification, and one vigorously challenged positive identification. With the disputed testimony

> the prosecution's case was far stronger. This testimony added two inferred 'reliable' identifications, and, inherently, two assertions as to guilt.
>
> It cannot be said 'I am at a loss to understand how any normal jury, as must assume this one to have been, could be led to believe, let alone be influenced by [the witness' testimony as to the out-of-court declarant's statements]. The testimony does not '[fade] into practical and legal insignificance.' Nor are we dealing here with 'gossamer possibilities of prejudice to a defendant [which serve] to' ... nullify a sentence ... and set the guilty free.' The error is not 'harmless beyond a reasonable doubt.'
>
> [citations omitted]

464 F.2d at 366-67.

In the present case, the single eyewitness identification was also vigorously challenged, on grounds which I cannot find to be unreasonable or

facially unpersuasive to a jury. In addition, there is also a total absence of any corroborative testimony, and the only legitimately-introduced testimony against petitioner was the victim's identification of him as the perpetrator; this, while certainly legally sufficient, cannot be deemed so overwhelming as to preclude every reasonable possibility that petitioner was unfairly prejudiced in the presentation of his defense by the hearsay evidence.

I further find that the closing argument of the prosecutor, in which he in essence urged the jury to accept the out-of-court statements as true, and drew for the jurors the connection between the petitioner and the address to which the officers were directed by the informant,

exacerbated the prejudicial impact of the testimony, eliminating any lingering possibility that the jury would not have inferred that petitioner had been identified as the guilty party by the informant. The argument of the prosecutor was, standing alone, violative of the Sixth Amendment, and the prejudicial effect sufficiently egregious to preclude a harmless error finding. United States v. Ragano, 476 F.2d 410, 414-15 (5th Cir. 1973). The introduction and rhetorical use of the hearsay testimony violated the Sixth and Fourteenth Amendments, depriving petitioner of a fundamentally fair trial.

I therefore recommend that the petition for writ of habeas corpus be granted, and that petitioner be discharged

custody unless the State of Florida affords him a new trial within 60 days from the date of the District Judge's Order.

Pursuant to 28 U.S.C. §636(b)(1)(C) and Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts, the parties may file and serve written objections to this Report with The Honorable Joe Eaton, United States District Judge, within ten (10) days after being served with a copy of this Report.

In Miami, Florida, February 24, 1983.

PETER NIMKOFF
PETER L. NIMKOFF
UNITED STATES MAGISTRATE

Copies to:

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Miami, FL 33125

Penny H. Hershoff
Assistant Attorney General
410 N.W. Second Avenue
Miami, FL 33128

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1977

CASE NO. 76-1197

MICHAEL HUTCHINS, **

Appellant, **

vs. **

THE STATE OF FLORIDA, **

Appellee. **

Opinion filed August 9, 1977

An Appeal from the Circuit Court for Dade County, Lenore Nesbitt, Judge.

Bennett H. Brummer, Public Defender and Elliot H. Scherker, Assistant Public Defender, for appellant.

Robert L. Shevin, Attorney General and Margarita Esquiroz, Assistant Attorney General, for appellee.

Before BARKDULL, HAVERFIELD and NATHAN, J.J.

PER CURIAM.

Affirmed.

CONSTITUTION AND STATUTORY PROVISIONS

Amendment V of the Constitution of the United States provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentmet or indictment of a Grand 'ury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI of the Constitution of the United States provides that:

> In all criminal prosecu tions, the accused shall enjoy the right to a speedy

> and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV of the Constitution of the United States provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the

equal protection of the laws.

Title 28, United States Code, Section 1257 provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treatiers or laws of the United States, or where any title,

right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 92o.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Title 28, United States Code,

Section 2254, provides inter alia that:

(a) The Supreme Court, Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be

granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

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UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT
OFFICE OF THE CLERK
56 FORSYTH STREET, N.W.
ATLANTA, GEORGIA 30303

December 7, 1983

Penny H. Brill, Esquire
Asst. Attorney General
401 Northwest 2nd Avenue, #820
Miami, FL 33128

No. 83-5256 - MICHAEL HUTCHINS -vs-
LOUIE L. WAINWRIGHT, ET AL.
(District Court No.
82-420-CIV-A[illegible])

MANDATE STAYED TO AND INCLUDING
JANUARY 6, 1984

This court has this day granted a stay of issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by the Supreme Court.

Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that Court.

A copy of the opinion, judgment, or Rule 25 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

SPENCER D. MERCER, CLERK

By: HENRIETTA BARNES
Deputy Clerk

Encls.

cc: Elliot H. Scherker, Esquire

A96

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

CASE NO. 83-5256

MICHAEL HUTCHINS,

Petitioner/Appellee,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Respondent/Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF RESPONDENT/APPELLANT

Nature of Preference

Habeas Corpus, 28 U.S.C. §2254

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A97

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II

THE DISTRICT COURT ERRED IN FINDING THAT THE PETITIONER'S CONFRONTATION CLAUSE CLAIM HAD BEEN SUFFICIENTLY PRESENTED TO THE STATE APPELLATE COURTS, WHERE THE CLAIM WAS PRESENTED IN ONLY STATE TERMS, AND WAS FRAMED IN TERMS OF PREJUDICIAL PROSECUTORIAL COMMENTS, AND NOT IN TERMS OF A SIXTH AMENDMENT CONFRONTATION CLAUSE VIOLATION.

The Respondent strenously submits that the district court erred in finding that the substantial equivalent of the confrontation claim was presented to the state appellate courts. Because the state appellate opinion was a per curiam affirmance without a written opinion, Hutchins v. State, 349 So.2d 1237 (Fla. 3d DCA 1977), this Court must look to the state appellate briefs to determine whether the substantial equivalent of the

confrontation claim was presented. The issue on direct appeal was framed as follows:

> Whether the trial court erred in allowing prosecutorial comments regarding the investigating officers' encounters with an unidentified third person to pervade the entire trial, where the only purpose of this argument was to lead the jury to draw the impermissible inference that this third person had identi fied the defendant as the perpetrator of the charged crime, but was afraid to testify in court.
>
> See Exhibit "A", Point II on Appeal, at 11.

In support of this allegation of error, the Petitioner cited state cases that admonished prosecutors from making comments that could not be reasonably inferred from the evidence or which was

inflammatory and calculated to raise passion or prejudice in the minds of the jury. See Exhibit "A", Brief of Appellant at 22-24. None of these cases contained any reference to any confrontation clause claims.[7]

[7]Adams v. State, 192 So.2d 762 (Fla. 1966)(comments by prosecution that equated victim of homicide to wives and relatives of jurors, and that defense counsel's statements "perverted and distorted things" and "violated his oath as a lawyer and human being" were unduly prejudicial and constituted error). Goddard v. State, 143 Fla. 28, 196 So. 596 (1940)(prosecutor's statements that defendant was "low down scoundrel" and "skunk" and there has never been an ounce of remorse in the "no good black heart of that scondrel". although improper, held not reversible in light of overwhelming evidence); Johnson v. State, 88 Fla. 461, 102 So. 549 (1924)(prosecutor's reference to the defendant that he "went out there for what cats and dogs fight for," and "is a brute", were reversible error). Richardson v. State, 335 So.2d 835 (Fla. 4th DCA 1976)(prosecutor's remarks that he "could have brought in a lot of police officers" and that case could have lasted

It is obvious that the actual gist of Petitioner's allegation of error was that the prosecutor's arguments were based on evidence not before the court at all and if it was a constitutional violation, it was a violation of his rights not to be deprived of life, liberty or property, without due process of law under the Fifth Amendment of the United

---

Footnote 7 (continued) longer constituted reversible error); James v. State, 334 So.2d 83 (Fla. 3d DCA 1976)(prosecutor's remark that pushers infest other individuals with his disease of heroin although improper, was not so prejudicial as to require a mistrial); Silvestri v. State, 332 So.2d 351 (Fla. 4th DCA 1976)(prosecutor's remark that the state's key witnesses were "obviously able to convince the police of their truthfulness or they would have been the ones on trial was prejudicial error) Thompson v. State, 318 So.2d 549 (Fla. 4th DCA 1975)(prosecutor's comment, concerning additional witnesses who could of been called were prejudicial in that they lead the jury to believe that there was other evidence).

States Constitution. This can be determined by reviewing the portions of the prosecutor's arguments emphasized by the Petitioner in his brief. The Petitioner was especially concerend with the prosecutor's explanation as to why the young black male did not testify, and his request to the jury to not only rely on what they heard, but to consider all the circumstances. See Exhibit "A", Appellant's brief at 21, 23. Respondent submits that if the Petitioner had intended to raise the issue in terms of a confrontation clause violation, he most certainly would have done so. Petitioner was able to frame his first issue on appeal, that the trial court erred in excluding a defense witness, as a basis for a violation of the Petitioner's due process

right to prepare and present a defense under the Sixth and Fourteenth Amendments to the United States Constitution. See Exhibit "A", Appellant's Brief at 12.

Further evidence that the Petitioner did not raise the substantial equivalent of a confrontation claim in the state appellate court, is found by reviewing the state's brief. The state argued in its brief that the prosecutor properly argued the facts which were established at trial and which were reasonably inferred from the facts established. The state cited to the portions in the transcript in which the two officers testified about their contact with the young black male. See Exhibit "B", Appellee's Brief at 17-20. The state also argued that trial counsel "never moved for a

mistrial or asked the trial court to take any action during the prosecuting attorney's argument or at the conclusion thereof" thus, he did not properly preserve his assertions regarding the prosecutorial arguments for appeal. See Exhibit "B", Appellee's Brief at 27. Thus, it is obvious that the state was not put on notice that the Petitioner was raising a violation of the confrontation clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.

Respondent submits that it is evident that the Petitioner did not raise the substantial equivalent of a confrontation clause claim in the state courts. Although, a hearsay objection may be sufficient to raise a confrontation issue

if raised in a confrontation posture, Thomas v. Estelle, 582 F.2d 939 (5th Cir. 1971) such an objection was not presented on the appellate level in the instant case. See Daye v. Attorney General of State of New York, 696 F.2d 186, 193 (2d Cir. 1982)(en banc).

In Thomas v. Estelle, supra, the hearsay objection was made in terms that indicated that the defense counsel wished the witness to be brought down to the courtroom so he could question her. In the instant case, although the Petitioner's trial counsel objected to the testimony on hearsay grounds as well as complaining that he was never given an opportunity to discover the young black male's identity, Petitioner's appellate counsel chose to frame the issue on

appeal only in terms of what the prosecutor said concerning the young black male and his reasons for not being a witness, in his closing argument. Not only did Petitoner's appellate counsel not phrase the issue in terms of a confrontation clause violation, he did not even allege that there was a violation of the hearsay rule.[8]

Respondent submits that the district court's finding that the substance of the confrontation claim was presented to the state appellate court is clearly in

[8]This is because at the time of the Petitioner's trial the officers' testimony as to the manner in which they investigated the case, testifying what they did, pursuant to information (not related in court) received from the informant, was permitted in Florida as not being hearsay. Collins v. State, 65 So.2d 61 (Fla. 1953); Kirby v. State, 44 Fla. 81, 32 So. 836 (1902).

error. It is well established that under 28 U.S.C. §2254, a federal habeas petitioner is required to have provided that state courts with a "fair opportunity" to apply controlling legal principles to the facts bearing upon his constitutional claim. Picard v. Connor, 404 U.S. 270, 276-77 (1971). Furthermore, the habeas petitioner must have "fairly presented" to the state courts the "substance" of his federal habeas corpus claim. Picard v. Connor, 404 U.S. at 275, 277-78. It is not enough that all facts necessary to support the federal claim were before the state courts or that a somewhat similar state law claim was made. Anderson v. Harless, ___U.S.___, 103 S.Ct. 276, 277 (1982). The argument raised in federal court must be the substantial equivalent

of that presented to the state courts "to insure that the 'method of analysis' was "readily available to the state court." Santana v. Felton, 685 F.2d 71, 74 (3d Cir. 1982).

Where a petitioner, on his direct appeal to the state appellate court, presented his claims in state terms only, the petitioner has failed to give the state courts a fair opportunity to consider his federal claims of error. Gulliver v. Dalsheim, 687 F.2d 655, 657 (7th Cir. 1982); Santana v. Fenton, supra; Steele v. Taylor, 684 F.2d 1193, 1206 (6th Cir. 1982); Winfrey v. Maggio, 664 F.2d 550, 553 (5th cir. 1981); Hart v. Estelle, 634 F.2d 987, 989 (5th Cir. 1981); Thomas v. Wyrick, 622 F.2d 411, 413 (8th Cir. 1980). Conquest v.

Mitchell, 618 F.2d 1053, 1056 (4th Cir. 1980); Johnson v. Metz, 609 F.2d 1052, 1054 (2d Cir. 1979). Alleging lack of a fair trial does not sufficiently alert a state court to a contention that the trial court failed to comport with due process guarantees. Kirksey v. Jones, 673 F.2d 58, 59-60 (2d Cir. 1982); Thomas v. Wyrick, supra at 1054-1055. A habeas petitioner will not be deemed to have fairly presented his claim to the state courts though the prior state proceedings technically asserted the same constitutional deficieny, the same facts that are urged in the federal court, are used to support of a different legal theory. Hart v. Estelle, supra at 989. See also Picard v. Connor, supra (claim in state court that indictment was amended in such

a way as to violate the Fifth Amendment, was not sufficient to apprise the state courts of a violation of the Equal Protection Clause of the Fourteenth Amendment). Furthermore, a defendant's citation to a state court decision predicated solely on state law will not be sufficient to fairly apprise a reviewing court of a potential federal claim merely because the defendant in the cited case advanced a federal claim. Anderson v. Harless, supra, 103 S.Ct. at 278, n.3.

The Respondent submits that where the Petitioner in his brief to the state appellate court presented the facts, but framed the issue on appeal in terms of prejudicial prosecutorial comments, and not in terms of whether the testimony of the police officers concerning the young

black male was hearsay and violated his right to confrontation, or even whether the prosecutors comments by themselves were hearsay or violated the petitioner's right to confrontation, the "substance" of his confrontation claim was not fairly presented to the state courts.

The lack of citation to federal constitutional provisions and federal authority in the Petioner's appellate brief must be given greater weight by this Court than the district court did. This is because it is well established that because evidence is admitted in violation of the hearsay rule, it does not lead to the automatice conclusion that a defendant's confrontation rights have been violated. California v. Green, 399 U.S. 149, 156 (1970). See also Daye v.

Attorney General of State of New York, supra. If Petitioner's state appellate counsel had intended to raise a confrontation claim, he could of cited the two Fifth Circuit Cases, United States v. Ragano, 476 F.2d 410 (5th Cir. 1973) and Favre v. Henderson, 464 F.2d 359 (5th Cir.)., cert. denied, 409 U.S. 942 (1972), as he did in his memorandum in support of petitioner's writ of habeas corpus. Thus, Respondent objects to the Magistrate's finding that the substantial equivalent of the present confrontation claim was raised in the state appellate court.

Respondent submits that this failure to fairly present this issue to the state

courts is not one of non-exhaustion,[9] but rather one of waiver under the doctrine of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977). In Wainwright, the United States Supreme Court held that failure to make a timely objection under Florida's contemporaneous objection rule to the admission of his inculpatory statements, absent a showing a cause for the noncompliance with the procedural rule and some showing of actual prejudice, bars federal habeas corpus review

[9]The respondent is asserting that the Petitioner has waived his claim, but if this Court finds there has been no waiver because the Petitioner still has a state remedy, then respondent asserts in the alternative, that this claim is unexhausted. See, e.g. Rose v. Lundy, _ U.S. __, 102 S.Ct. 1198 (1982); Pitchess v. Davis, 421 U.S. 482, 98 S.Ct. 1748 (1975); Picard v. Connor, supra; see also Gulliver v. Dalsheim, supra; Share v. Iowa, 581 F.2d 727 (8th Cir. 1978).

of the defendant's Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966) claim. This cause and prejudice requirement of Wainwright v. Sykes, has been extended to include claims which the defendant has failed to include on direct appeal in compliance with state procedural appellate requirements. See, e.g., Wright v. Bombard, 638 F.2d 457 (2d Cir. 1980); Forman v. Smith, 633 F.2d 1055 (4th Cir. 1980); Evans v. Maggio, 557 F.2d 430 (5th Cir. 1977); Cole v. Stevenson, 620 F.2d 430 (5th Cir. 1977); Carter v. Scully, 533 F.Supp. 257 (S.D.N.Y. 1982). Furthermore, issues presented in the state trial court but not presented to the appellate court are deemed abandoned. Gorham v. Wainwright, 588 F.2d 178, n.2 (5th Cir. 1979). Galtieri v. Wainwright,

582 F.2d 348, n.8 (5th Cir. 1978); Gardner v. Blackburn, 569 F.2d 856 (5th Cir. 1978); Sneed v. Blackburn, 569 F.2d 854 (5th Cir. 1978); O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977); Henzel v. Florida, 475 F.2d 1271 (5th Cir. 1973).

Respondent submits that Wainwright v. Sykes, is applicable to the instant case because under state procedural rules, the Petitioner would be precluded from raising the confrontation clause issue on collateral review. See, e.g., Engle v. Isaac, ___U.S.___, 102 S.Ct. 1558, 1570 n.28 (1982). Under Rule 3.850 of the Florida Rules of Criminal Procedure, the Petitioner would be precluded from raising this issue, because it is a matter which could have been raised on

direct appeal. Florida courts have consistently held that issues which could have been raised on direct appeal from conviction will not support a subsequent collateral attak by way of a motion for post-conviction relief. See, e.g., Alvord v. State, 396 So.2d 184, 191 (1981); Adams v. State, 380 So.2d 423, 424 (Fla. 1980) Harvey v. State, 383 So.2d 770, 771 (Fla. 3d DCA 1980). Thus, Respondent submits that because Petitioner's confrontation clause claim is foreclosed from state review due to procedural default, this Court must reverse the district court and dismiss the confrontation clause claim absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation.

A117

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 83-5256

MICHAEL HUTCHINS,	**
Petitioner/Appellee,	**
vs.	**
LOUIE L. WAINWRIGHT, Secretary, Department of Correction, State of Florida,	**
Respondent/Appellant.	**
	**

MOTION FOR REHEARING

COMES NOW, Respondent/Appellant, LOUIE L. WAINWRIGHT, by and through his undersigned counsel moves this Honorable Court for rehearing in the above styled cause and as grounds therefore states as follows:

1. On September 19, 1983, this Court filed its opinion in the above cause affirming the district court's grant of the Petitioner/Appellee's Petition for Writ of Habeas corpus, on the basis that the Petitioner/Appellee had been denied his Sixth Amendment right to the confrontation of witnesses.

2. In its opinion, this Court held that the confrontation issue, although "obliguely stated", was sustantively raised before the state appellate court. See Slip Opinion at p.4855. In reaching this conclusion, this Court has misapprehended and overlooked the following facts and law:

1. This Court states at p.4855 of the Slip Opinion that "Respondent contends that the petitioner, on direct

appeal, raised the issues of the admission of hearsay evidence and prosecutorial misconduct, not a sixth amendment confrontation clause claim." (emphasis added). However, in its brief, the Respondent/Appellant stated specifically:

> Not only did Petitioner's appellate counsel not phrase the issue in terms of a confrontation clause violation, he did not even allege that there was a violation of the hearsay rule.
>
> Brief of Respondent/Appellant at p.34 (emphasis added)

Again, at pp.36-37 of its brief, the Respondent/Appellant stated:

> The Respondent submits that where the Petitioner in his brief to the state appellate court presented the facts, but framed the issue on appeal in terms of prejudicial prosecutorial comments, and not in terms of whether the testimony of the police officers concerning the young

black male was hearsay and violated his right to confrontation, or even whether the prosecutors comments by themselves were hearsay or violated the petitioner's right to confrontation, the "substance" of his confrontation claim was not fairly presented to the state courts.

Respondent/Appellant went on to state in f ^ of its brief that the reason there was no allegation of a violation of the hearsay rule was because at the time of the Petitioner/Appellee's trial, the officer's testimony as to the manner in which they investigated the case, testifying what they did, pursuant to information (not related in court) received from the informant, was permitted in Florida courts as not being hearsay, citing Collins v. State, 65 So.2d 61 (Fla.

1953); Kirby v. State, 44 Fla. 81, 32 So. 836 (1902). Thus, it is clear that the Respondent/Appellant never contended or conceded that the issue of the admis sion of the hearsay evidence had been raised on direct appeal.

A122

IN THE DISTRICT COURT OF APPEAL OF

FLORIDA

THIRD DISTRICT

CASE NO. 76-1197

MICHAEL HUTCHINS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

BRIEF OF APPELLANT

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Public Defender and

A123
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Eleventh Judicial Circuit
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Attorneys for Appellant

INTRODUCTION

In the Court below the appellant, Michael Hutchins, was the defendant and the appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they stood in the Court below. The symbol "R" will be used to designate the record on appeal. All emphasis is added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On September 4, 1975, an information was filed charging the defendant with two counts: I robbery and II - assault with intent to commit murder. (R. 217-219) On September 5, 1975, the defendant was arraigned and stood mute. The Court directed the entry of a plea of not guilty, adjudged the defendant insolvent

and appointed the Public Defender to represent him. (R. 220)

Jury trial commenced before the Honorable Lenore C. Nesbitt, Judge of the Eleventh 'udicial Circuit in and for Dade County, Florida on Apil 13, 1976. (R. 1-209, 225-229)

Prior to the prosecution's opening statement, the defendant proffered certain evidence that he intended to present to support his defense. (R. 4-6) This evidence was that another crime with the same modus operandi had been committed about a month prior to the crime charged in the information. (R. 4-5) The following similarities between the two crimes were proffered: both victims were driving taxicabs for the Diamond Cab Company at the time of the robbery: both

drivers had picked up the robber as a passenger at the Veteran's Administration Hospital pursuant to a radio call; both drivers directed to go to the same location, which, upon arrival, was discovered to be a vacant lot· both drivers were threatened by the robber with a knife: both drivers gave the police the same description of the robber. (R. 4-5)

The driver in the first robbery was shown phtographs and identified the defendant as the perpetrator of the crime. (R. 5) However, in a live line-up, he identified two other men as the perpetrator, not the defendant. (R. 5) In the case at bar, the driver similarly identified the defendant after being shown photographs. (R. 4) However, here, there was no subsequent live line-up. (R. 5)

The defense counsel argued that if there had been an identification at the line-up in the first case, this evidence would be admissible under Williams v. State, 110 So.2d 654 (Fla. 1959); therefore, evidence of the lack of identification should be likewise be admitted. (R. 5-6) The defense counsel further argued that this evidence was clearly relevant since the identification of the perpetrator of the crime was the sole issue in this case.

The prosecution objected to the admission of this evidence. (R. 6-7, 8)

The Court ruled that the Williams rule was not applicable to prove misidentification and therefore that this profferred evidence was inadmissible. (R. 9)

During its opening statement, the

prosecution referred to an encounter that the arresting officer had with a third person, prior to the defendant's arrest. (R. 23) The defendant objected to any allusion being made to any testimony that this witness may have. (R. 33) The ground for this objection was that this witness was not going to testify, and that the defendant had been unable to learn his identity. (R. 23) Outside the jury's presence, the prosecution proffered that during his investigation of the robbery, the police detective had a conversation with a young black male who subsequently left his name and phone number in the police car. (R. 25) This person later gave the detective information which led to the defendant's arrest. (R. 25)

The trial court ruled that the prosecution could "refer to the fact that there was a bystander; someone that was seen at the crime and that the person at the scene of the crime left some notation, and as a result of the notation, the officer followed up his investigation." (R. 38) The trial court emphasized that the defendant should have made a formal motion to have this witness produced. (P. 34, 38, 39)

Thereupon, the jury returned, and the prosecution resumed it opening statement. (R. 40) Over the defendant's objection, the prosecution stated that Detective Purdy would testify that he saw a young black male bystander and spoke with him; and, the bystander subsequently

dropped a slip of paper into the detective's police car. (R. 40) In addition, the prosecution disclosed that Detective Shipes would testify that he accompanied Detective Purdy to the scene of the crime. (R. 40) After his investigation of the scene, Detective Shipes returned to the police car

> ...and there was a piece of paper in that car with some writing on it, and that when he got back to the office, he made a phone call, and as a result of that phone call, the next morining he and another detective met with a young black male and that the three of them drove to 1840 --- (R. 41)

Thereupon, the defendant interposed an objection and requested a side bar. (R. 41) The Court sustained this objection, stating that the prosecution's statement was contrary to the Court's previous

ruling. (R. 42) The trial court denied the defendant's motion for a mistrial and asked if the defendant wanted the jury to be given a corrective instruction. (R. 42) The defendant declined this offer, stating that any corrective instruction would worsen the problem. (R. 43)

During the defendant's opening statement, defense counsel stated that the only issue was the identify of the person who perpetrated the crime. (R. 45)

Wesley Preston testified that on the day in question, he was employed as a taxicab driver by the Diamond Cab Company. (R. 51) As the result of a radio call, Preston drove to the Veteran's Administration Hospital and picked up a passenger. (R. 52) Pursuant to the

passenger's request, Preston drove to N.W. 61st Street and 22nd Avenue. (R. 43-55) At this address, Preston observed vacant lots on both sides of the street. (R. 55) Thereupon, Preston turned to the back seat of the car, where the passenger was sitting. The passenger stabbed Preston with a knife. While the car still rolling, Preston got out. The passenger stopped the car and went back to where Preston lay in the road. (R. 57) The passenger had a knife in his hand. He picked up money that had fallen out of Preston's pocket and then left (R. 58)

Preston was subsequently transported to the hospital. (R. 59-60) The following day Preston was shown a photo display and identified the defendant as the passenger in the cab. (R. 61)

Detective James Purdy testified that on the day in question, he proceeded to the robbery scene in response to a radio call. (R. 82-83) When he arrived at the scene Detective Purdy conducted an area canvas which he defined as:

> A neighborhood contact with the people in the area that may have possibly seen what occurred. (R. 84)

At this point, the defendant interposed an objection and requested a sidebar conference. (R. 84) The defendant argued that this testimony was improper. (R. 85) The court overruled this objection, but instructed the prosecution to stay within the confines previously delineated. (R. 86)

Purdy further testified that he had occasion to talk to people during the

area canvass. (R. 86) He observed a young black male drop a piece of paper in his police car. (R. 87-88) The defendant objected to this testimony and moved for a mistrial. (R. 88) The Court denied the motion for a mistrial, and instructed the prosecution to pursue another line of questioning. (R. 88)

Prior to calling Detective Norman Shipes as a witness, the prosecution proffered the nature of Shipe's testimony. (R. 94-95) The prosecution stated that Shipes would testify that after he completed his investigation at the robbery scene, he returned to his office and made a telephone call:

> The next morning he met with a young black male and another detective, proceeded to 1840 N.W. 60th Street, looked at an apartment, got out, made an investigation, talked to people in the area, went back to his office and made out a photo display. (R. 95)

The defendant objected to this testimony on the ground that mentioning the black male was irrelevant, and the prosecution's only purpose in this testimony was to lead to the impermissible inference that the black male in the car had pointed out the defendant. Furthermore, there was no evidence, other than this testimony, that this black male even existed since neither the prosecution nor defendant had spoken with him. (R. 95-96)

The trial court overruled this

objection on the ground that the defendant previously had an opportunity to obtain the black male's name through a proper motion. (R. 96)

Detective Norman Shipes testified that in the day in question, he investigated the scene of the robbery. (R. 99) When he returned to his police car, after this investigation at the scene, he found a piece of paper lying on the front seat of the car. (R. 100) This paper had an individual's name, address and phone number written on it. (R. 100) He discussed this paper with Purdy, and subsequently returned to his office, where he made a phone call. (R. 100) The next day, Shipes met with a youn black male in the vicinity of the robbery. (R. 101) The defendant objected

to this testimony on the grounds previously argued, and requested a side-bar conference. (R. 101) The trial court did not allow a side-bar, and overruled the objection. (R. 101)

Shipes further testified that he drove with the young black male to 1840 N.W. 60th Street and contacted some residents of that area. He then drove the young black male back to the location where they had first met, and proceeded back to his office. (R. 101)

Thereupon, the defendant requested a side-bar, wherein he renewed his objec tion and moved for a mistrial. (R. 102) The Court overruled this objection, stating:

> ...For reasons previously given by the Court, that the Public Defender was aware of this person, but made no motion to produce him, and the fact that the relevance of any of this is not harmful testimony, I deny the motion for mistrial, and I overrule the objection. (R. 102)

Shipes further testified that when he returned to his office he obtained a photograph of the defendant and made a photo display. (R. 102) Preston identified the defendant's picture in this photo display. (R. 105-106) The photo display was received into evidence, marked as State's Exhibit I. (R. 107)

Shipes further testified that he subsequently obtained an arrest warrant and arrested the defendant at his residence, 1840 N.W. 60th Street. (R. 107-108)

At the close of the State's case, the defendant moved for a judgment of acquittal. (R. 122) The trial court denied this motion as to both Count I and Count II of the information. (R. 127, 129) Thereupon, the defendant renewed all previous motions, including the motions for mistrial. The trial court denied these motions. (R. 129)

Thereupon, the defendant renewed his request to call, as a defense witness, the victim of a very similar crime, whose name appeared on the prosecution's witness list. (R. 130-132) The trial court denied this request. (R. 132) Thereupon, the defense rested and renewed all previous motions. (R. 134) The Court

reduced Count II of the information to assault with intent to commit murder in the second degree, and denied all other previous motions. (R. 136) The defense counsel proffered that he had curtailed his opening statement to conform with the Court's ruling which excluded the testimony of the first victim, and would likewise curtail his closing argument. (R. 136)

During the State's closing argument, the prosecutor reiterated the testimony of Purdy and Shipes regarding the role of the young black male in their investigation. (R. 166) The defendant objected for the purpose of the record. (R. 166) The Court instructed the defendant to wait until the conclusion of the prosecutor's argument to renew his objection. (R. 167).

The prosecutor further argued the following:

> . . . crimes of this nature create violent fear and tremendous emotions for people who are involved and see these type of crimes. Especially, persons who might know persons that commit crimes like this. They become very fearful of what people that commit crimes of this type of nature might do to them, if they crossed them. It creates fear in the neighborhood; people that have to live with this violent nature; people who have the fear do not want to get involved with police officers, they do not want to cooperate with police officers, and if they cooperate with police officers, they certainly do not want to come to court. They do not want to physically face the accused; the defendant. It creates serious problems for everybody. (R. 169-170)

Thereupon, the defendant objected. The trial court stated the she would allow

the defendant time to object at the conclusion of the State's argument. (R. 170) The prosecutor continued his argument as follows:

> I ask you ladies and gentlemen, not only to rely on what you heard here, but to consider all the circumstances involved in this crime . . . . (R. 170)

Thereupon, the defendant renewed his objection. The Court, in effect, sustained this objection by stating:

> . . . I do not think you ought to pursue this line of endeavor any more. I think you ought to proceed to a new area. (R. 170)

The jury found the defendant guilty of both counts of the information. (R. 205, 257, 258) Thereupon, the Court entered an adjudication of guilt of the defendant as to both counts. (R. 207, 259-260)

On April 23, 1976, the defendant was sentenced as follows: as to Count I of the information, to twenty years incarceration in the state penitentiary; (R. 212, 261) as to Count II of the information, to ten years incarceration in the state penitentiary, to be served consecutively with the presence imposed in Count I. (R. 212-213)

A motion for a new trial was filed on April 23, 1976. (R. 262) This motion was denied on May 18, 1976. (R. 263) A notice of appeal was timely filed on June 17, 1976. (R. 263) This appeal follows.

POINTS INVOLVED ON APPEAL

I

WHETHER THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF THE ONLY DEFENSE WITNESS ON THE GROUND OF IRRELEVANCY WHERE THE DEFENDANT PROFFERED THAT THIS TESTIMONY WAS RELEVANT TO THE IDENTITY OF THE PERPETRATOR OF THE CRIME AND WOULD EXCULPATE THE DEFENDDANT, THEREBY VIOLATING THE DEFENDANT'S DUE PROCESS RIGHT TO PREPARE AND PRESENT A DEFENSE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, §§ 9, 16 OF THE CONSTITUTION OF THE CONSTITUTION OF THE STATE OF FLORIDA.

II

WHETHER THE TRIAL COURT ERRED IN ALLOWING PROSECUTORIAL COMMENTS REGARDING THE INVESTIGATING OFFICERS' ENCOUNTERS WITH AN UNIDENTIFIED THIRD PERSON TO PERVADE THE ENTIRE TRIAL, WHERE THE ONLY PURPOSE OF THIS ARGUMENT WAS TO LEAD THE JURY TO DRAW THE IMPERMISSIBLE INFERENCE THAT THIS

THIRD PERSON HAD IDENTIFIED THE DEFENDANT AS THE PERPETRATOR OF THE CHARGED CRIME, BUT WAS AFRAID TO TESTIFY IN COURT.

ARGUMENT

I

THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF THE ONLY DEFENSE WITNESS ON THE GROUNG OF IRRELEVANCY WHERE THE DEFENDANT PROFFERED THAT THIS TESTIMONY WAS RELEVANT TO THE IDENTITY OF THE PERPETRATOR OF THE CRIME AND WOULD EXCULPATE THE DEFENDANT, THEREBY VIOLATION THE DEFENDANT'S DUE PROCESS RIGHT TO PREPARE AND PRESENT A DEFENSE UNDER THE SIXTH AND AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, § § 9, 16 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

In the case at bar, the trial court excluded the testimony of the only defense witness, and thereby denied the defendant minimum fundamental due process as guaranteed by the Constitution of the

State of Florida, Article I, § 9[1] and 16[2] and the Constitution of the United States, Amendments VI[3] and XIV[4].

The exclusion of this critical witness, the only witness on behalf of the defendant, denied the defendant his right to present a defense. The United States Supreme Court has expressed the

[1]Fla. Const., Art. I § 9 provides in pertinent art: "No person shall be deprived of life, liberty or property without due process of law. . . ."

[2]Fla. Const., Article I § 16 provides in pertinent part: "In all criminal prosecutions the accused shall. . . have the right to have compulsory process for witnesses. . . . "

[3]U.S. Const. Amend. VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy right . . . . to have compulsory process for obtaining witnesses in his favor. . ."

[4]See, Duncan v. Louisana, 391 U.S. 145 (1968) and Pointer v. Texas, 380 U.S. 40 (1965) which apply pertinent portions of the Sixth Amendment to the States through the Fourteenth Amendment.

following principle of law regarding the right to present a defense:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present the defendant's version of the facts as well as the prosecution's to a jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witness to establish a defense. This right is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14, 19 (1967).

The trial court's ground for exclusion of testimony in the case at bar was that this witness' testimony was irrelevant. (R. 9) Relevant evidence is defined as "evidence which proves or tends to prove any fact material to the issues in the case before the court." Drayton

v. State, 292 So.2d 395, 396 (Fla. 3d D.C.A. 1974), cert. denied 300 So.2d 900 (Fla. 1974). The term "relevancy" describes evidence that has "a legitimate tendency to prove or disprove a given proposition that is material as shown by the pleadings." Zabner v. Howard Johnson's Incorporated of Florida, 227 So.2d 543, 545 (Fla. 4th D.C.A. 1969).

The cornerstone of relevancy is logic and reason. See Gard, Florida Evidence § 82 (1967). As was stated in Watkins v. State, 121 Fla. 58, 163 So. 292, 293 (1935):

> In civil as well as in criminal cases, facts which on principles of sound logic tend to sustain or impeach a pertinent hypothesis of an issue are deemed relevant and admitted in evidence. . .

Prior to the court's ruling in the

case at bar, the defense counsel proffered to the Court the nature of the witness' testimony. (R. 4-6) The witness, Mr. Lewis, was the victim of robbery that occurred approximately one month prior to the charged offense. (R. 4-5) Both robberies were committed with the same modus operandi: both victims were driving taxicabs for the Diamond Cab Company at the time of the robberies; both drivers had picked up the robber as a passenger at the Veteran's Administration Hospital pursuant to a radio call; both drivers were directed to go to the same location, which, upon arrival, was discovered to be a vacant lot; both drivers were threatened by the robber with a knife. (R. 4-5), In addition, both victims gave the police the same description of the passenger. (R. 4-5)

Mr. Lewis, the first victim, identified the defendant as the robber after being shown photographs. (R. 5) He was subsequently unable to identify the defendant in a live line-up.

The defendant argued that this misidentification of the defendant by the first witness was highly relevant to the identification of the defendant in the charged crime and, since it tended to exculpate the defendant it should be admitted. (R. 5-6)

Williams v. State, 110 So.2d 654 (Fla. 1959) is the leading case regarding the admissibility of evidence of similar crimes. The Court in Williams, supra, held the following:

> Our initial premise is the general canon of evidence

> that any fact relevant to prove a fact in issue is admissible into evidence unless its admissibility is precluded by some specific rule of exclusion.
>
> * * *
>
> . . . evidence revealing other crimes is admissible if it casts light upon the character of the act under investigation by showing motive, intent, absence of mistake, common scheme, identity or a system or general pattern of criminality so that the evidence of the prior offenses would have a relevant or a material bearing on some essential aspect of the offense being tried. Williams v. State, 110 So.2d at 658, 662.

In the case sub judice, the proffered evidence clearly shows a common scheme or general pattern or criminality. It is likely that the same person committed both crimes. Therefore proof that the defendant was misidentified as the

perpetrator of the first crime would be relevant to disprove the accuracy of the identification of the defendant as the perpetrator of the crime charged at the case at bar.

Although in Williams, the evidence of a collateral crime was admitted by the prosecution to establish the identify of the defendant, the defendant must be accorded the same right to introduce evidence in support of his defense of misidentification. This conclusion is mandated by the underlying theory of admissibility propounded by the Supreme Court of Florida in Williams, supra. Prior to Williams, evidence of similar crimes was excluded, unless it fell within certain excepted "admissible" categories. Now the rule is one of inclusion unless the

admission of the evidence is precluded by a specific rule of exclusion.

Furthermore, one of the major recognized dangers of admitting such evidence -- i.e., unfair prejudice to the defendant by showing bad character or criminal propensities -- is clearly not present in the case at bar. In addition, there is no unfair prejudice to the prosecution in the case at bar since this witness appeared on the prosecution's own witness list. (R. 8)

In recognition of the priniciple that the Williams rule should be liberally applied, the Second District Court of Appeal extended this rule beyond its original scope in Holley v. State, 328 So.2d 224 (Fla. 2d D.C.A. 1976). In that case, the Court held that:

> If the Williams Rule testimony is relevant enough to be permitted, competent evidence tending to disprove the Williams Rule testimony is equally important. Holley v. State, 328 So.2d at 226.

Thus, the right of the defendant to introduce all evidence in support of his defense is well recognized. Brown v. State, 229 So.2d 37 (Fla. 4th D.C.A. 1974). Saviano v. State, 287 So.2d 102 (Fla. 3d D.C.A. 1973).

In the case at bar, the defense was simply that the defendant did not commit the crime; that the victim misidentified the defendant. This same defense was asserted in Corley v. State, 335 So.2d 849 (Fla. 2d Dist. 1976) There, the defendant sought to introduce evidence that the only identifiable fingerprints on a vodka bottle found on the couch near

the murder victims body were those of an unidentified third person. The Second District Court of Appeal held that the refusal of the trial court to admit this evidence was reversible error.[5]

The defendant in Corley, supra, had the right to present evidence suggesting that another person committed the crime. The evidence in the case at bar, should likewise be admitted since this evidence, like the evidence in Corley, tends to establish the misidentification of the defendant as the perpetrator of the crime.

Although the precise issue in the

[5]In support of this holding, the Court relied upon Commonwealth v. Loomis, 270 Pa. 254, 113 A. 428 (Pa. 1921); and State v. Cooper 2 N.J. 540, 67 A. 2d 298 (N.J. 1949).

case at bar has never been decided by the Florida court system, an almost identical case was decided by the United States Court of Appeals for the Fifth Circuit. In Holt v. United States, 342 F.2d 163 (5th Cir. 1965), the defendant sought to introduce evidence showing that another person had mistakenly identified the defendant as the perpetrator of an almost identical crime. The Fifth Circuit Court of Appeals held that the exclusion of this evidence was reversible error:

> [A] defendant on trial for the commission of a crime, in

> order to negative his guilt, may show that other crimes of a similar nature have been committed at or about the same time by some person other than himself. Holt v. United States, 342 F.2d at 165 at 165-166.

This same result has been reached by the three state supreme courts that have considered that issue. In State v. Bock, 229 Minn. 449, 39 N.W. 2d 887 (Minn. 1949), the defendant was charged with the forgery of a check. At trial, he sought (unsuccessfully) to introduce evidence that other checks had been forged in the same manner and at about the same time by somebody other than himself. The Supreme Court of Minnesota held that the exclusion of this evidence was reversible error:

> Where the state has introduced evidence of other

> crimes to establish identity, the defendant is entitled to rebut the inference that might be drawn therefrom by showing that the crimes have been committed by someone else....He should also have the right to show that crimes of a similar nature have been committed by some other person when the acts of such other person are so closely connected in point of time and method of operation as to cast doubt upon the identification of defendant as the person who committed the crime charged against him. 39 N.W. 2d at 892 (citations omitted).

Similarly, in Commonwealth v. Murphy, 282 Mass. 593, 185 N.E. 486 (Mass. 1933), the Supreme Court of Massachusetts held that it was reversible error to exclude the defendant's proffered evidence that three other crimes, perpetrated with the same modus operandi, had been committed by

someone other than himself. In one of these three crimes, as in the case at bar, the victim had previously misidentified the defendant as the perpetrator of the crime.

The Supreme Court of Alabama also approved this policy in Green v. State, 258 Ala. 471, 64 So.2d 84 (Ala. 1953), wherein it stated:

> In order to rebut the circumstantial evidence against him, the defendant had a right to introduce any legal evidence tending to show that some one else may have been guilty in exoneration of himself. 64 So.2d at 88.

Therefore, in the case at bar, this Court should follow the holdings of the Fifth Circuit Court of Appeal in Holt v. United States, supra; the Supreme Court of Minnesota in State v. Bock, supra; the Supreme Court of Massachusetts in

Commonwealth v. Murphy, supra; and the Supreme Court of Alabama in Green v. State, supra; and the policy favoring the admissibility of all relevant evidence enunciated in Williams, supra; Holley, supra; Brown, supra; Saviano, supra, and Corley, supra, and hold that the exclusion of the relevant evidence proffered by the defendant denied the defendant his right to present a defense and therefore constituted reversible error.

II

THE TRIAL COURT ERRED IN ALLOWING PROSECUTORIAL COMMENTS REGARDING THE INVESTIGATING OFFICERS' ENCOUNTERS WITH AN UNIDENTIFIED THIRD PERSON TO PERVADE THE ENTIRE TRIAL, WHERE THE ONLY PURPOSE OF THIS ARGUMENT WAS TO LEAD THE JURY TO DRAW THE IMPERMISSIBLE INFERENCE THAT THIS THIRD PERSON HAD IDENTIFIED THE DEFENDANT AS THE PERPETRATOR OF THE CHARGED CRIME, BUT WAS AFRAID TO TESTIFY IN COURT.

Throughout the entire trial, the prosecution referred to the assistance given to the investigating officers by an unidentified young black male. (R. 23, 41, 84, 87-88, 95, 100, 101, 166, 169-170).

The nature and significance of this testimony was succinctly summarized by the prosecution in its closing argument:

Detective Purdy had some testimony which you should consider because you should consider all the circumstances in this case; everything involving this case. Detective Purdy said he was on the scene, and he was looking for evidence.

Now, a young black male rode by. A young black male stopped and then later he saw the young black male put a piece of paper in the detective's car. If you are to consider all the circumstances in this case, that is significant.

Then you heard Detective Shipes. Detective Shipes is an experienced police officer; detective; a professional. He went to the scene. He talked to the uniformed officers. He went to the hospital to try to talk to the victim.

Later, when he got in the car, he found this piece of paper with a-- he testified with a telephone number on it. I think he said a name also. When got back to the office that night, he made a telephone call. The next day

he testified he met with a young black male, and he testified that he drove to 1840 Northwest 60th Street.

* * *

He testified he went to 1840 Northwest 60th Street, and as you remember later on, that is where the Defendant lives.

He testified that he got out of the car, and he conducted an investigation on the scene there, that he went back to his office, and he made out this photo display, and put the photograph of Michael Hutchins in the photo display. . . . (R. 167-168)

The prosecution then offered an explanation as to why this young black male did not testify at the trial:

A crime of this nature creates fear; . . . .crimes of this nature create violent fear and tremendous emotions for people who are involved and see these type [sic] of crimes especially, persons who might know persons that commit crimes like this. They become very fearful of

> what people that commit crimes of this type of nature might do to them, if they crossed them. It creates fear in the neighborhood; people that have to live with this violent nature; people who have the fear do not want to get involved with police officers, they do not want to cooperate with police officers, and if they cooperate with police officers, they certainly do not want to come to court. They do not want to physically face the accused; the Defendant. It creates serious problems for everybody.
>
> * * *
>
> I ask you, ladies and gentlemen, not only to rely on what you heard here, but to consider all the circumstances involved in this crime. (R. 169-170)

During the course of the trial, the defendant objected to references to the young black male's involvement in the case at least ten times and made three motions for mistrial. (R. 33, 40, 41,

84, 88, 95-96, 101, 102, 166, 170. Despite repeated admonishments from the trial court, the prosecutor made this unidentified young black male a major feature of the entire trial.

It is well established that a prosecutor must confine his closing argument to evidence in the record and must not make any comment which could not be reasonable inferred from that evidence or which is inflammatory and calculated to raise passion or prejudice in the minds of the jury. Adams v. State, 192 So.2d 76? (Fla. 1966); Goddard v. State, 143 Fla. 28, 196 So. 596 (1940); Johnson v. State, 88 Fla. 461, 102 So. 549 (1924); Richardson v. State, 335 So.2d 835 (Fla. 4th D.C.A. 1976); James v. State, 334 So.2d 83 (Fla. 3d D.C.A. 1976); Silvestri

v. State, 332 So.2d 351 (Fla. 4th D.C.A. 1976); Thompson v. State, 318 So.2d 549 (Fla. 4th D.C.A. 1975).

Under this general principle of law, reversal is mandated in cases such as the case at bar, where the violation consists of reference to other witnesses who were not called to testify.

In Richardson, supra, the Fourth District Court of Appeal held that it was reversible error for the prosecutor to state, in his closing argument, that he "could have brought in a lot of police officers" and that the case could have lasted longer.

Likewise, in Thompson, supra, it was reversible error for the prosecutor to state that he "could have brought in other witnesses", and thus imply that he

had additional knowledge or information about the case which had not been disclosed to the jury.

The facts in the case at bar are more compelling than those in Richardson, supra, and Thompson, supra. Here the prosecutor had only just begun his prejudicial, improper remarks when he alluded to an uncalled witness -- the unidentified young black male. He then stressed the significance of this witness' knowledge and concluded by explaining why this witness who, (by implication) was any eyewitness to the crime, was not called. The prosecution explained that his lack of witnesses was due to the community's fear of the defendant. (R. 166-170) The prosecution then stated more specifically that "if they

[the witnesses] cooperate with police officers, they certainly do not want to come to court." (R. 170) Clearly, this refers to the young black male who had allegedly cooperated with the investigating officers, but was not at the trial to testify. The prosecusion concluded this improper, highly prejudicial portion of his argument by stating:

> I ask you, ladies and gentlemen, not only to rely on what you heard here, but to consider all the circumstances involved in this crime. (R. 170)

There was absolutely no evidence in the record to support the prosecutor's argument that this unidentified witness, or any witness, was afraid to testify at the trial. This error was compounded by the prosecutor's direct appeal to the jury to consider facts that were not adduced at trial.

The prosecutor further exceeded the bounds of propriety by his reference to the community's fear of the defendant. The only purpose of such a comment was to arouse passions and the prejudices of the jury. This is the very practice condemned by the Supreme Court of Florida in Goddard, supra.

It is well settled that the accused has a fundamental right to a fair trial free from improper argument and therefore, unless it is clear from the record that the improper remarks did not prejudice the accused, the judgment must be reversed. Grant v. State, 194 So.2d 612 (Fla. 1967); Thompson v. State, 318 So.2d 549 (Fla. 4th D.C.A. 1975). Smith v. State, 273 So.2d 415 (Fla. 2d D.C.A. 1973) Chavez v. State, 215 So.2d 750

(Fla. 2d D.C.A. 1968). The test to be used, as enunciated by the Florida Supreme Court is:

> . . .not whether the infraction actually contributed to the success. . . but rather whether it might have. (Emphasis original). Grant v. State, 194 So.2d at 616.

In the case at bar, the only evidence to support a conviction was the identification by the victim of the defendant is a photo line up and at preliminary hearing. This testimony was undoubtedly bolstered by the improper argument of the prosecutor that there were other witnesses who were afraid to come into Court. It cannot be said that the prosecutor's argument. . . "might not have had the effect of unfairly tipping the scales against the defendant." Richardson, 335 So.2d at 836.

CONCLUSION

BASED upon the cases, authorities, and policies cited herein, the appellant respectfully requests this honorable Court to reverse the judgment of the lower court.

Respectfully submitted,

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A173

IN THE DISTRICT COURT OF APPEAL OF
FLORIDA
THIRD DISTRICT

CASE NO. 76-1197

MICHAEL HUTCHINS

Appellant,

vs.

THE STATE OF FLORIDA

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA
CRIMINAL DIVISION

* *

BRIEF OF APPELLEE

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POINTS ON APPEAL

I

WHETHER THE TRIAL COURT WAS CORRECT IN RULING THAT THE TESTIMONY OF LOWELL LEWIS WAS IRRELEVANT TO THE INSTANT CASE, WHERE SAID TESTIMONY DID NOT ESTABLISH THAT ANOTHER PERSON, NOT THE DEFENDANT, HAD COMMITTED THE CRIME WITH WHICH THE DEFENDANT WAS CHARGED?

II

WHETHER THE TRIAL COURT ERRED IN ALLOWING PROSECUTORIAL COMMENTS REGARDING THE INVESTIGATING OFFICER'S TESTIMONY AS TO THEIR OBSERVATIONS AND THE INVESTIGATIONS THEY CONDUCTED PURSUANT TO INFORMATION PROVIDED TO THEM BY A THIRD PARTY WHO DID NOT TESTIFY AT TRIAL?

II

THE TRIAL COURT DID NOT ERR IN ALLOWING PROSECUTORIAL COMMENTS REGARDING THE INVESTIGATING OFFICERS' TESTIMONY AS TO THEIR OBSERVATIONS AND THE INVESTIGATIONS THEY CONDUCTED PURSUANT TO INFORMATION PROVIDED TO THEM BY A THIRD PARTY WHO DID NOT TESTIFY AT TRIAL.

In Spencer v. State, 133 So.2d 729 (Fla. 1967) the Supreme Court of Florida stated the rule of law applicable to prosecutorial comment to a jury at the close of all the evidence. There the Court stated:

> The rule is that considerable latitude is allowed in arguments of the merits of the case. Logical inferences from the evidence are permissible. Public prosecutors are allowed to advance to the jury all legitimate argument within the limits of their forensic talents in order to effectuate their enforcement of the criminal laws. Their

> discussion of the evidence so long as they remain within the limits of the record is not to be condemned merely because they appeal to the jury to perform their public duty by bringing a verdict of guilty.

Spencer v. State, supra, at 731. See also Johnsen v. State, 332 So.2d 69 (Fla. 1976); Thomas v. State, 326 So.2d 413 (Fla. 1975).

Thus, the prosecuting attorney can argue to the jury facts which are established by the record or which may be reasonably inferred from the facts established. Spencer v. State, supra; Johnsen v. State, supra; Wilson v. State, 305 So.2d 50 (Fla. 3d DCA 1974); Harrelson v. State, 259 So.2d 526 (Fla. 1st DCA 1972).

The State submits that comments made by the prosecutor in the instant case did not violate these principles of law.

In the presentation of the State's case there was direct testimony to the effect that an unidentified black male placed a slip of paper with his name, address, and phone number in the automobile of a team of investigating officers. (R. 99-101). There was also direct testimony to the effect that two officers, acting pursuant to information on the slip of paper, contacted the young black male and the three of them together proceeded to a certain address. (R. 101). Detective Purdy's testimony was as follows:

> Q. [By the Assistant State Attorney]. Officer, just tell the Court what you saw.
>
> A. I observed a black male whom I had previously seen in the area drop a piece of paper in the police car I arrived in.

Q. Was this black male stopped before he put in? Was there anything that occurred prior to the time he put what you saw -- slip the piece of paper in the car?

A. Yes, I had talked to him.

(R. 87, 88)

In turn, Detective Shipes' testimony on this same subject was as follows:

Q. And then what happened, if anything at all, after you talked to the various people on the scene?

A. When I got ready to clear the scene and respond to Jackson Memorial Hospital, there was a piece of paper which was laying on the front seat of my car with a [sic] individual's name, address, and phone number.

Q. Did you discuss that piece of paper with anybody? Just yes or no.

A. Yes.

Q. And who did you discuss it with?

A. Detective Purdy.

Q. From the scene, where did you go, if anywhere at all?

A. I respondent to Jackson Memorial Hospital, at which time I was advised by the doctors in the emergency room that Mr. Preston had already gone up to surgery and that I would not be able to interview him until probably the following day.

Q. What did you do after that, if anything at all?

* * * *

THE WITNESS: After I cleared Jackson Memorial Hospital I responded to the Public Safety Department robbery office and made a phone call.

Q. The next day, what did you do then, if anything at all in reference to this

investigation?

A. The next day Detective Wendell, who also works in robbery, and myself met with a young black male in the vicinity where the robbery occurred.

* * * *

Q. [By Assistant State Attorney]: After you met with the young black male, what did you do then, if anything at all?

A. I responded to the area of 1840 N.W. 60th Street and contacted some citizens who lived in that area.

Q. What did you do after you left that scene?

A. After I left that scene, I dropped the young black male, who was with me -- I dropped him off at the location where I had picked him up. I responded back to my office.

(R. 99-100)

The detective then testified that when he returned to his office, he obtained a photograph of the defendant and he then made up a photo display, which he showed to the victim at the hospital. (R. 102; see also R. 105). After the above quoted testimony was given by Detective Shipes, the trial court overruled a defense objection and denied a defense motion for a mistrial outside the jury's presence "for reasons previously given by the Court," as the trial court explained, that the Public Defender was aware of this person, but had made no motion to produce him, as well as on the basis that the testimony was relevant. (R. 102).

Indeed, this testimony had been discussed early in the trial, during a sidebar conference had at the time of the

prosecuting attorney's opening statement.

At that time, counsel stated:

> [Assistant State Attorney]: We are not alluding to the man's testimony. We can say that he had a conversation, and then he can tell the jury exactly what he did, as a result of it, your Honor. He can tell the jury, and it is admissible as to what he did. He can not tell the jury as to what anybody else told him because that would be hearsay. We are not going into hearsay.
>
> [Defense Counsel]: The inference is so plain. It is the same thing as saying that the man told him this is who did it. I saw it, and this is who did it.
>
> [Assistant State Attorney]: There is not any difference then the situation in which the officer goes to the scene of a crime, and he receives some information, or a BO'O, and all we are saying is that as a result of his investigation, he

did certain things.

(R. 36)

The trial court ruled as follows:

> THE COURT: That is as far as he has gotten.
>
> I think the way to pursue this matter is to inquire of the officer simply as a result of his investigation what he did he do.
>
> * * * *
>
> I am going to allow you to refer to him in the manner that I have previously ruled, Mr. Goldstein, but with this additional factor; You can refer to the fact that there was a by-bystander; someone that was seen at the crime and that the person at the scene of the crime left some notation, and as a result of the notation, the officer followed up his investigation.
>
> (R. 37, 38)

Hence, since this information was adduced through testimony actually presented during the course of the trial below, it was proper for the prosecutor to comment on these facts, as it would be proper for him to comment on other evidence adduced at trial. Spencer v. State, supra. The rules set out in Spencer and subsequent cases clearly allow comment on the evidence and facts properly presented at trial, and reasonable inferences therefrom.

Additionally, for reversal to be warranted, the defendant must show that the comments of the prosecutor constituted harmful error, for it is well settled that the harmless error rule applies to prosecutorial comment. Johnsen v. State, supra, at 71, 72 (quoting the harmless

error statute, Fla. Stat. §924.33); Darden v. State, supra, (finding the comment involved therein harmless when considered with the totality of the record); Falcon v. State, 226 So.2d 399 (Fla. 1969); United States v. Bursten, 453 F.2d 605 (5th Cir. 1971), cert. denied, 409 U.S. 843, 93 S.Ct. 44, 34 L.Ed.2d 83 (1972).

Clearly, the remarks involved herein did not give use to error that warrants reversal. See Arline v. State, 303 So.2d 37 (Fla. 1st DCA 1974); Wingate v. State, 232 So.2d 44 (Fla. 3d DCA 1970). See also James v. State, 334 So.2d 83 (Fla. 3d DCA 1976). Cf. Darden v. State, 329 So.2d 287 (Fla. 1976). The complained of argument was not as compelling as that in Arline v. State, supra, and Wingate v.

State, supra, the comments in which were nonetheless held to be harmless. The prosecutor in Arline, supra, stated:

> . . . and I would ask you to find in your hearts as I have found for the past month as I have prepared for this case and interviewed by witnesses, worked solidly that Jake Arline committed this heinous crime.
>
> Arline v. State, supra, at 38.

The court held that this argument was not so prejudicial as to warrant reversal, particularly when considered in the light of the totality of the final argument. In Wingate, supra, the prosecutor said:

> I think there is at stake today the protection and safety of society. [The defense counsel] is asking you to let this man walk back on the streets again; and I am asking you not to; I am asking you not to allow this man to go back on the street and

redo those things that he has done.

Wingate v. State, supra, at 45.

The court found that since the trial judge did not find the comment so in flammatory and prejudicial, it would not disturb his finding because he was in better position to make that determina tion.

Florida law permits a wide degree of latitude in argument of counsel. See, e.g., Spencer v. State, 133 So.2d 729 (Fla. 1961). Argument of counsel is proper even though it is an attempt to persuade the jury. Additionally, it will not be presumed that a jury was misled by the argument. This rule has been repeat edly recognized by the Florida Supreme Court, which has recently stated in

Johnsen v. State, 332 So.2d 69 (Fla. 1976), and Thomas v. State, 326 So.2d 413, 415 (Fla. 1975), as well as earlier in Paramore v. State, 229 So.2d 855, 860 (Fla. 1969), as follows:

> It will not be presumed that jurors are led astray to wrongful verdicts by impassioned eloquence and that, it is well settled that the comments of counsel in the progress of trial before a jury are controllable in the judicial discretion of the trial court and an appellate court will not interfere with the exercise of such discretion unless a clear abuse has been made to appear.
>
> Johnsen, supra, at 71; Thomas, supra, at 415.

This Court recently cited the foregoing proposition applicable to prosecutorial comment in affirming the defendant's conviction in James v. State, supra. In James, the prosecutor told the

jury that there were four letter words in the English language that were offensive, but that there was "a six letter word and it's PUSHER . . ." (spelling it) that was dirtier than that; the prosecutor then went on to state, "A pusher infests other individuals with his disease of heroin." James v. State, supra, at 84. This Court, noting the overwhelming evidence of guilt contained in the record, found

> no abuse on the part of the trial judge of the great latitude of discretion afforded him in granting or denying motions for a new trial.
>
> James v. State, supra, at 84.

In James, this Court reasoned that when the prosecutor makes a statement to which defense counsel objects, the trial

judge "is in a position of experience and intimacy with the case which cannot be duplicated by any other tribunal," and he determines whether the jury would be so prejudiced by the comment as to render a verdict different from the one properly supported by the evidence and presentation of counsel. James v. State, supra, at 84 (citing Wingate v. State, supra, and Darden v. State, supra).

In applying the aforementioned cases to the facts sub judice, it is clear that the argument complained of did not give rise to harmful error. The argument in the instant cause was not as terse or acrimonious as either the statement in Arliner, supra, or the one in Wingate, supra. The statements in these cases were held harmless. It is therefore

submitted that the statements sub judice, which were clearly at least not any more compelling than those involved in the aforementioned cases, did not give rise to error; however, if error, it was likewise harmless. (See discussion of the evidence contained in the record to sustain the defendant's conviction under Point I of this brief, at pp.14, 15)

Further, the State did not make this "young black male" a major feature of the trial, as defendant contends. In fact, before admitting the officers' testimony regarding their assistance from the "young black male," the court below, out of the hearing of the jury, had the prosecutor reveal the extent of his inquiry of the investigating officers and how such questioning would reflect on their

conversations with the "young black male." (R. 25-26). The court reasonably complied. (R. 85-87).

In the presentation of its case the State made no specific reference to anything anyone said regarding the identification of defendant as the robber with exception of the testimony of the victim. According to the testimony of Officer Shipes, defendant was arrested only after the victim identified defendant in a photo line-up. (R. 107). Based on the record there is no doubt that the victim's identification of the defendant (on at least three different occasions) was, in fact, the major evidence in the State's case.

It must also be noted that defense counsel never moved for a mistrial or

asked the court to take any action during the prosecuting attorney's argument or at the conclusion thereof. Indeed, when defense counsel objected during the State's argument, the trial court twice advised him that he would be allowed to renew his argument and objection at the conclusion of the State's argument to the jury. (R. 167, 170). Defense counsel, however, failed to make any motions or argue his objection at the end of the argument to the jury, as the trial court had told him to do; he would thus have been heard at that time. (See R. 179, 188). Having failed to specifically move for or ask that the trial court take any action at trial regarding the prosecutorial argument, the defendant should not

be heard to complain on appeal in this regard. Cf. Thomas v. State, supra: Jones v. State, 204 So.2d 515 (Fla.1967).

In conclusion, because the record in the case at bar contains sufficient evidence to support the defendant's conviction for the crime charged (see discussion of the evidence to sustain the conviction at pp. 14, 15 of this brief), any possible error on the part of the trial court arising from prosecutorial remarks, which were not objected to on this particular ground during or after the State's closing argument, would not have changed the result of the trial, and, therefore, would clearly fall within the harmless error statute, Fla. Stat. §59.041 and §924.33 (1975).

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-1102

RECEIVED
JAN 31 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

LOUIE L. WAINWRIGHT,

Petitioner,

vs.

MICHAEL HUTCHINS,

Respondent.

Supreme Court, U.S.
FILED
JAN 31 1984
ALEXANDER L. STEVAS
CLERK

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Respondent restates the questions presented set forth in the petition for writ of certiorari as follows:

Whether a federal district court, upon determining that the substance of a constitutional claim raised in a petition for writ of habeas corpus has been presented to the state courts, albeit without express reliance upon federal constitutional provisions, and that the method of analysis asserted in federal court was readily available to the state courts in passing upon the claim, may properly hold that state remedies have been exhausted under 28 U.S.C. § 2254(b).

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-1102

LOUIE L. WAINWRIGHT,

Petitioner,

vs.

MICHAEL HUTCHINS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

The respondent, Michael Hutchins, files this brief in opposition to the petition for writ of certiorari filed by petitioner in this cause.

STATEMENT OF THE CASE

The facts surrounding respondent's trial and the pertinent state appellate proceedings are accurately set forth in the petition at pages 7-15. Respondent's Statement of the Case will be limited to a recitation of the pertinent federal proceedings.[1]

Respondent's first pro se petition for writ of habeas corpus in the United States District Court for the Southern District of Florida raised four claims: 1) denial of a speedy trial; 2) exclusion of defensive evidence by the state trial court; 3) suppression by the prosecution of favorable evidence; and 4) the

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1 The symbol "P.A." will be utilized to designate petitioner's appendix, and the symbol "R.A." will refer to respondent's appendix.

unconstitutional admission of hearsay testimony (P.A. 21-22). The order of dismissal, entered on September 24, 1979, notes that the court had before it the briefs filed on respondent's direct appeal, the trial transcript, and a response filed by the custodian (P.A. 43). The court noted the four claims raised by respondent, and ruled as follows:

> Hutchins raised the substantial equivalent of numbered issues 2 and 4 on direct [a]ppeal to the Third District Court of Appeal of Florida which [affirmed] his conviction. A subsequent state motion to vacate raised issue 1, the denial of the right to a speedy trial. But Hutchins failed to appeal the denial of the motion to vacate to any state appellate court.
>
> It is evident that although Hutchins has exhausted state remedies as to two of the four issues raised in the petition, he has not exhausted his state remedies as to issue 1, the denial of the right to a speedy trial, nor issue number 3, the failure of the prosecution to disclose evidence favorable to the defendant. (P.A. 44-45; citation omitted).

Relying upon the rule that "state remedies must be exhausted as to all issues raised in a federal habeas corpus petition" prior to federal consideration of a prisoner's claims, the court dismissed the petition without prejudice for further exhaustion of state remedies (P.A. 45-46).

Respondent did not initiate further state-court proceedings (P.A. 22). On March 2, 1982, he filed his second pro se petition, raising three claims: 1) the exclusion of defensive evidence by the state trial court; 2) the unconstitutional admission of hearsay testimony; and 3) the suppression by the prosecution of favorable evidence (P.A. 22-23). The petitioner moved to dismiss the petition for failure to fully exhaust state remedies (P.A. 23; R.A. 1-6). In the motion, petitioner conceded that respondent had "rais[ed] the [substantial] equivalent of two of the four grounds which he presently raises in this federal habeas corpus petition, that is, ground (1), the exclusion of a [defense] witness . . . and ground (2), the admission of hearsay evidence at his trial", but asserted that respondent had failed to present his suppression claim to the state courts (R.A. 2-3). Respondent accordingly contended that "[o]f these three grounds, only two (grounds 1 and 2) have been presented to both

the state trial and appellate courts which have considered and rejected them", and that the petition should be dismissed for exhaustion of state remedies as to all claims in the petition (R.A. 3). Petitioner also requested the court to compel respondent to state his intentions regarding the speedy-trial claim which had been raised in the first petition, but not in the second (R.A. 4-5).

The District Court thereafter permitted respondent's state-appointed appellate counsel to appear on his behalf (R.A. 7, 65; see P.A. 122-23). The court directed counsel to file a statement "of those grounds upon which Petitioner seeks to proceed or which he waives or discards", and granted leave to file a supporting memorandum (R.A. 7). On October 21, 1982, counsel for respondent filed the required announcement, advising the court that respondent was abandoning all claims except for the two questions properly before the court, i.e., the exclusion of defensive evidence and the admission of hearsay testimony, and also filed a supporting memorandum of law on those claims (R.A. 8-10; P.A. 23-24). On October 25, 1982, the court issued an order providing that the case would proceed solely on the two exhausted claims, and permitting petitioner to file a responsive memorandum "[o]n these questions" (R.A. 11).

On November 22, 1982, petitioner filed a memorandum of law which asserted in part that the confrontation claim had not been presented to the state appellate court, in that appellate counsel "never once couched the claim in terms of a violation of the Confrontation Clause." (R.A. 17). Petitioner urged that "his previous concession that the Confrontation Clause claim had been exhausted was erroneous" (R.A. 21), and contended that respondent should be found to have waived his right to habeas corpus review of this claim or, in the alternative, to have failed to fully exhaust his state remedies (R.A. 18-21).

At oral argument before the magistrate on November 29, 1982, counsel for respondent asserted that the substantial equivalent of the confrontation claim had been presented to the state appellate court on direct appeal, and further that petitioner was

barred from raising a waiver or exhaustion objection, both by the previous order of the district court finding that the claim had been exhausted, and by his failure to have promptly litigated the issue (R.A. 24-35).[2] In its order, the court held that respondent was entitled to relief on the confrontation claim and rejected petitioner's procedural arguments (A. 47-86).[3]

The court found that petitioner had "failed to present an acceptable or justifiable excuse for its failure to previously assert these procedural claims." (P.A. 56-57). The court held that the prior dismissal order constituted "a final judicial determination that the substantial equivalent of the present confrontation claim" had been presented to the state courts, barring relitigation of the issue, and further ruled that petitioner's failure to raise his objections until after respondent "had justifiably and detrimentally relied" upon petitioner's concession that the claim had been exhausted "both equitably estops [petitioner] from raising his procedural defense, and constitutes a waiver." (P.A. 58-59; citations omitted).

The court also held that "the substantial equivalent of the confrontation claim was presented to the state courts, both at trial and on appeal." (P.A. 59-60). With regard to the presentation of the issue on direct state appeal, the court noted the phrasing of the issue, and held as follows:

> I find that the substance of the present claim was presented to the state courts by petitioner. . . . The essence of the claim is that the prosecution obtained an unfair advantage by effectively introducing into evidence the out-of-court statements of the

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2 At oral argument before the magistrate, counsel for petitioner explained the failure to previously assert these objections as follows:

> . . . I first got this case -- I don't mean to claim ignorance -- but I had just started with this office, to be honest with Your Honor, I had maybe an erroneous concession that [it] had been exhausted. (R.A. 43).

3 Since the District Court adopted the magistrate's recommendation in its final order granting relief (P.A. 37-38), the report will be referred to as the order of the court.

> unidentified informant as ostensible non-hearsay, and then relying upon those statements as evidence of Petitioner's guilt. This is precisely what the Confrontation Clause is designed to prohibit. (P.A. 61-62).

On appeal to the United States Court of Appeals for the Eleventh Circuit, petitioner asserted that "the district court's order in the first petition was not a final order that would be res judicata and preclude [petitioner] from raising the procedural issues", that the court had erred in finding that his conduct in the subject litigation constituted a waiver of his procedural claims, and that the substantial equivalent of the confrontation claim had not been presented to the state courts (R.A. 70-84).[4] In contending that the substantial equivalent of the federal claim had not been presented to the state court on direct appeal, petitioner urged the following standard upon the Court of Appeals:

> . . . [A] federal habeas petitioner is required to have provided [the] state courts with a "fair opportunity" to apply controlling legal principles to the facts bearing upon his constitutional claim. Furthermore, the habeas petitioner must have "fairly presented" to the state courts the "substance" of his federal habeas corpus claim. It is not enough that all facts necessary to support the federal claim were before the state courts or that a somewhat similar state law claim was made. The argument raised in federal court must be the substantial equivalent of that presented to the state courts "to insure that the 'method of analysis' was readily available to the state court." (R.A. 82; citations omitted).

The Court of Appeals, while noting that the wording in respondent's state appellate brief had been "inartful" (P.A. 34), held that the substantial equivalent of the confrontation claim had been presented to the state courts:

> . . . Although the phrasing of the issue on direct appeal did not use the words "confrontation clause," the appeal clearly

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Counsel for petitioner, in oral argument before the Court of Appeals, abandoned the claim that the court's prior order, finding that the confrontation claim had been exhausted, was not a final order. On the merits of respondent's claim, petitioner's only argument on appeal was that the confrontation error had been harmless (P.A. 90-91). No issue is presented in his petition as to the holding of the Court of Appeals that the error was prejudicial.

> presented the problem of allowing and urging the jury to infer that an unnamed non-testifying witness had identified the petitioner. The fifth circuit has held that objection on hearsay grounds is sufficient to present a state court with a subsequently raised federal constitution confrontation clause claim. [citation omitted]. The applicable law requires that a habeas corpus petitioner present "the substance of a federal habeas corpus claim" to the state courts. [citation omitted]. However, it is not required that the petitioner present book and verse on the federal constitution. [citation omitted]. We are mindful of respondent's citation to Anderson v. Harless, ___U.S.___, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982), for the proposition that the petitioner must couch his claim so as to allow a state court to rule on any applicable constitutional grounds. The Court in Harless, however, still focused on the premise that it is the substance of the claim that the court looks to in analyzing whether a federal claim has been voiced.
>
> We conclude that the issue, as presented on direct appeal, albeit obliquely, did sufficiently alert the state court to a confrontation issue. The substance of petitioner's claim was that the prosecution obtained an unfair advantage by effectively introducing into evidence the out-of-court statements of the unidentified informant. The prosecution then relied upon these statements as evidence of the petitioner's guilt. This is exactly what the confrontation clause is designed to prohibit. [citations omitted]. (P.A. 28-31).

REASONS FOR DENYING THE WRIT

THE DECISION OF THE COURT OF APPEALS, HOLDING THAT PETITIONER HAD EXHAUSTED HIS STATE REMEDIES, IS BASED UPON AN APPLICATION OF THE STANDARDS ENUNCIATED BY THIS COURT FOR DETERMINING WHETHER A HABEAS CORPUS PETITIONER HAS PRESENTED THE SUBSTANCE OF A FEDERAL CONSTITUTIONAL CLAIM TO THE STATE COURTS PRIOR TO INVOKING 28 U.S.C. § 2254.

The controlling standard in the Eleventh Circuit for determining if a constitutional claim raised in a habeas corpus petition brought by a state prisoner has been sufficiently presented to the state courts to satisfy the exhaustion requirement of 28 U.S.C. § 2254(b) is as follows:

> . . . A habeas petitioner need not spell out each syllable of his claim before the state courts in order to satisfy the exhaustion requirement of § 2254(b). It suffices that the substantial equivalent of a petitioner's federal habeas claim has been argued in the state proceedings. Lamberti v. Wainwright, 513 F.2d 277, 282 (5th Cir. 1975).

Accord Speigel v. Sandstrom, 637 F.2d 405, 407 (5th Cir. 1981).[5]

This standard does not require, as an essential prerequisite to a finding of exhaustion, that a petitioner have expressly relied upon federal constitutional provisions or authority in state court proceedings, in accordance with the rule of Picard v. Conner, 404 U.S. 270 (1971):

> We emphasize that the federal claim must be fairly presented to the state courts. . . . Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts.
>
> * * *
>
> . . . Obviously there are instances in which "the ultimate question for disposition," will be the same despite variations in the legal theory or factual allegations urged in its support. . . . Hence, we do not imply that respondent could have raised [his] claim only by citing "book and verse on the federal constitution." We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts. . . . Id. at 275-78 (citations omitted).

Picard commands that a habeas petitioner "must have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim." Anderson v. Harless, ___U.S.___, 103 S.Ct. 276, 277 (1982)(citations omitted).

Petitioner does not--and, indeed, could not--assert that the Eleventh Circuit standard stated above runs afoul of the Picard rule. Rather, petitioner contends that the interpretation of that standard in the present case constitutes an "abrogation" of Picard and Harless. Petition for Writ of Certiorari (hereinafter referred to as "Petition") at 34.[6] The lack of merit to this

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5 See Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981)(adopting former Fifth Circuit precedent decided prior to October 1, 1981).

6 In both the District Court and the Court of Appeals, petitioner litigated his contention that respondent had failed to properly present his confrontation claim to the state courts primarily as a waiver argument under Wainwright v. Sykes, 433 U.S. 72, 87 (1977), and Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 1572 (1982)(R.A. 18-21, 85). The basis of petitioner's argument was that Florida law prohibits respondent from (Cont.)

contention is affirmatively established on the face of the court's opinion.

The Court of Appeals expressly noted the Picard rule that the "'substance of a federal habeas corpus claim'" must first be presented to the state courts, and the holding in Harless that a petitioner "must couch his claim so as to allow a state court to rule on any applicable constitutional grounds." (P.A. 28-29; citations omitted). The ultimate conclusion of the court was that the state appeal "clearly presented the problem of allowing and urging the jury to infer that an unnamed non-testifying witness had identified the petitioner" and, accordingly, that "[t]he substance of petitioner's claim" was presented to the

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relitigating his claim in post-conviction proceedings, and that the procedural-default rule of Sykes and Isaac therefore bars respondent from litigating the claim on habeas corpus (R.A. 18-19, 86). Florida law does provide that post-conviction remedies under Rule 3.850 of the Florida Rules of Criminal Procedure are unavailable for review of issues which could have been asserted on direct appeal, see, e.g., Adams v. State, 380 So.2d 423 (Fla. 1980), and respondent's state remedies are accordingly deemed to have been "exhausted", regardless of whether he sufficiently presented the confrontation claim to the state courts. Engle v. Isaac, supra at 1570 n.28.

In attempting to recast his argument under the exhaustion doctrine, petitioner now asserts that respondent is "possibly" precluded from litigating his claim under the state post-conviction rule, but is not precluded from presenting it "in a petition for writ of habeas corpus in the state appellate court alleging ineffective assistance of appellate counsel." Petition at 47 n.22. However, while Florida law does permit challenges to the effectiveness of appellate counsel on the ground that counsel failed to raise meritorious issues on appeal, see, e.g., Knight v. State, 394 So.2d 997 (Fla. 1981), the Supreme Court of Florida has recently noted that this remedy is collateral in nature, and that "[a]llegations of ineffective appellate counsel therefore should not be allowed to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal." McCrae v. Wainwright, 439 So.2d 868, 870 (Fla. 1983). Since petitioner would not be entitled to the same consideration of his claim on state habeas corpus as he would on direct appeal, that collateral remedy is not "available" within the meaning of 28 U.S.C. § 2254(c). Engle v. Isaac, supra at 1572 n.28.

The issue in this case is thus waiver, not exhaustion; in any event, it was so litigated in the Court of Appeals. Therefore, even if petitioner had prevailed in that court on the claim raised in his petition, a remand for further litigation on cause and prejudice under the Sykes-Isaac rule would have been necessary. Controlling precedent in the Eleventh Circuit requires that the initial determination of cause must be made in the district court, see e.g., Huffman v. Wainwright, 651 F.2d 347, 352 (5th Cir. 1981), and provides that if a district court has erroneously ruled that no procedural default occurred in state court, the petitioner must be given an opportunity to litigate cause and prejudice before the district court prior to a final determination of his petition. Clark v. Wainwright, 701 F.2d 895, 897 (11th Cir. 1983).

state court (P.A. 30-31; emphasis supplied).[7] The focus of the court upon the "substance" of petitioner's state-court argument is in complete accord with the commands of Picard, and the court correctly characterized the holding of this Court in Harless, which similarly compels consideration of the "substance" of state-court claims. 103 S.Ct. at 277.

Petitioner discusses at some length the approaches which have been adopted by the courts of appeals in addressing cases which present Picard problems, and notes some minor linguistic

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This interpretation of the Picard rule, which centers on whether the same "method of analysis" necessary to determine the constitutional claim was available to the state court, see, e.g., Bisaccia v. Attorney General of State of New Jersey, 623 F.2d 307, 311-12 (3d Cir. 1980), cert. denied, 449 U.S. 1042 (1980); Zicarelli v. Gray, 543 F.2d 466, 472 (3d Cir. 1976), was specifically urged upon the court below by petitioner, who argued that Picard requires that "[t]he argument raised in federal court must be the substantial equivalent of that presented to the state courts 'to insure that the "method of analysis" was readily available to the state court.'" (R.A. 82; citation omitted). Petitioner's failure to assert that Picard mandates a stricter standard should bar it from so claiming before this Court. See, e.g., United States v. Ortiz, 422 U.S. 891, 898 (1975)(argument not raised in court of appeals will not be considered on certiorari).

It should also be noted that no jurisdictional claim is or could be presented as to the application of that standard in this case, i.e., with regard to the court's holding that the substantial equivalent of respondent's claim was actually presented to the state courts. Petitioner's argument on the application of the standard does not assert a conflict of decisions or other basis for issuance of the writ, but is simply a restatement of the arguments on the merits which the district court and court of appeals have rejected. Petition at 38-47.

Moreover, even if there were any merit to petitioner's substantive contentions, they are foreclosed by the ruling of the district court in the prior habeas proceeding. As is set forth in the Statement of the Case, the district court specifically determined, in the first habeas proceeding brought by respondent, that the substantial equivalent of the confrontation claim had been raised in the state courts (P.A. 44-45). In this proceeding, the district court found that its prior order was res judicata on this question (P.A. 58). Petitioner's only challenge to this finding on appeal was that the previous order had not been final (R.A. 70-73), an argument which he abandoned in oral argument before the court of appeals. With the finality of the order conceded, the fundamental rule that it is binding "'not only as to every matter which was offered and received to sustain or defeat to claim or demand, but as to any other admissible matter which might have been offered for that purpose'" applies. Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597 (1948)(citations omitted).

The holding of the court below that the substantial equivalent of the confrontation claim had been presented to the state courts pretermitted any need to address this issue. Nonetheless--and particularly in light of petitioner's agreement that the prior order was final--the result in this case would have been the same regardless of the substantive merit of the court's ultimate conclusion.

differences among their decisions. Petition at 27-34. However, petitioner does not assert a conflict between the decision in this case and other federal appellate decisions as a basis for invoking this Court's certiorari jurisdiction, and none exists; regardless of the language used in interpreting Picard, the courts of appeals uniformly adhere to the principle that the "substance", rather than the form, of a federal constitutional claim must have been presented to the state courts. See, e.g., Nelson v. Solem, 714 F.2d 57, 59-60 (8th Cir. 1983); United States ex rel. Nance v. Fairman, 707 F.2d 936, 940-41 (7th Cir. 1983); Daye v. Attorney General of State of New York, 696 F.2d 186, 194 (2d Cir. 1982); Williams v. Holbrook, 691 F.2d 3, 6-7 (1st Cir. 1982). The determination by the court of appeals in the present case that respondent's litigation of his federal claim in the state courts sufficiently set forth the substance of his claim and required the same method of analysis as required for disposition of that claim is not out of harmony with these precedents, and, more importantly, is completely consistent with the controlling pronouncements of this Court.

CONCLUSION

Based upon the foregoing, respondent requests this Court to deny the petition for writ of certiorari in this cause.

Respectfully submitted,

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Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

BY: _____
ELLIOT H. SCHERKER
Assistant Public Defender

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-1102

LOUIE L. WAINWRIGHT,

Petitioner,

vs.

MICHAEL HUTCHINS,

Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari, Motion for Leave to Proceed in Forma Pauperis, and Notice of Appearance have been served upon PENNY H. BRILL, Assistant Attorney General, 401 N.W. Second Avenue, Suite 820, Miami, Florida 33128, counsel for petitioner, by depositing same in the United States mail, first class mail, postage prepaid, this 20TH day of January, 1984, and that all parties required to be served have been served this date.

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

BY: Elliot H. Scherker
ELLIOT H. SCHERKER
Assistant Public Defender

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-1102

LOUIE L. WAINWRIGHT,

Petitioner,

vs.

MICHAEL HUTCHINS,

Respondent.

NOTICE OF APPEARANCE

The undersigned hereby enter their appearance as counsel for the respondent, Michael Hutchins, in the above-styled cause.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

BY: _____
ELLIOT H. SCHERKER
Assistant Public Defender

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CASE NO. 83-1102

RECEIVED
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SUPREME COURT, U.S.

LOUIE L. WAINWRIGHT,

Petitioner,

vs.

MICHAEL HUTCHINS,

Respondent.

APPENDIX TO BRIEF OF
RESPONDENT IN OPPOSITION

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

ELLIOT H. SCHERKER
Assistant Public Defender

Counsel for Respondent

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-0420-Civ-JE

MICHAEL HUTCHINS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

MOTION TO DISMISS AND/OR EXTENSION OF TIME AND MEMORANDUM OF LAW

FILED

Respondent, STATE OF FLORIDA, by and through its undersigned counsel, files this Motion to Dismiss and/or Extension of Time and Memorandum of Law in response to this Court's order to Show Cause dated May 11, 1982, and states as follows:

I

PROCEDURAL HISTORY

1. Respondent is filing with this Memorandum the transcript of the trial, record on appeal, and the assignments of error and Petitioner's brief, filed in the District Court of Appeal of Florida, Third District, on Petitioner's direct appeal from his conviction and sentence. The symbol "R" will be used for reference to this record on appeal. Respondent is also filing with this memorandum various documentary exhibits which will be referred to by their corresponding letter designation.

2. Petitioner is presently in the custody of Louis L. Wainwright, Secretary, Department of Offender Rehabilitation of the State of Florida (who should be substituted and added as the proper party respondent in this action), pursuant to a valid judgment of guilty entered by the Circuit Court of Dade County, Florida, Criminal Division, Case No. 75-7951. The Petitioner, after a trial by jury, was convicted of robbery and an assault with intent to commit second degree murder. (R.259). The transcript of the trial and the record on appeal are attached as Exhibit "F". Petitioner was sentenced to a term of twenty (20) years imprisonment on the robbery conviction, and to a term of ten (10) years imprisonment in the

state penitentiary on the assault conviction, this latter sentence to run consecutively with the sentence imposed for robbery. (R.261).

3. Petitioner appealed his conviction to the District Court of Appeal, Third District, raising the subsequent equivalent of two of the four grounds which he presently raises in this federal habeas corpus petition, that is, ground (1), the exclusion of a defesne witness on the basis that his testimony was irrelevant, and ground (2), the admission of hearsay evidence at his trial. (See Petition at 4-5; see, Exhibit "A", Points I and II on Appeal in Petitioner's brief on direct appeal and Exhibit "B", Respondent's brief on direct appeal). The Petitioner was represented by counsel on his direct appeal. The District Court of Appeal, per curiam affirmed the Petitioner's conviction, without an opinion. Hutchins v. State, 349 So.2d 1237 (Fla. 3d DCA 1977).

4. Subsequently, Petitioner filed a Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254, in the United States District Court, Southern District of Florida, Case No. 78-3264-Civ-NCR. (Exhibit "C"). In said petition, Petitioner raised four grounds, (1) the denial of the right to a speedy trial, (2) the conviction was obtained by the unconstitutional failure of the court to disclose evidence favorable to the defendant, and (4) the conviction was obtained by the court's unconstitutional act of letting hearsay evidence in, which was only favorable to the prosecution. (See Exhibit "C", Petition in Case No. 78-3264-Civ-NCR, at 4-5). The Petition was dismissed by the District Court for failure to exhaust state remedies for two of the grounds asserted (grounds (1) and (3)). (See Exhibit "D"). The dismissal was without prejudice so that Petitioner could exhaust his state remedies. This federal petition followed.

II

ARGUMENT

1. It is clear that the Petitioner has again failed to exhaust his state remedies. Petitoner has raised three grounds

in this federal habeas corpus petition. Of these three grounds, only two (grounds 1 and 2) have been presented to both the state trial and appellate courts, which have considered and rejected them, (Exhibits "A", "B"). Ground (3), the alleged unconstitutional failure of the prosecution to disclose evidence favorable to the defendant, has never been presented to, and therefore has not been considered by any state court, trial or appellate.[1]

It is well established that the federal courts will refrain from considering habeas corpus claims until all presently available state remedies are exhausted. Rose v. Lundy, __U.S.__, 102 S.Ct. 1198 (1982); Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509 (1971); Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822 (1963). Comity requires both presentation to and consideration of an issue by both the trial and the state appellate courts before consideration thereof by this court is appropriate. See Williams v. Wainwright, 410 F.2d 144 (5th Cir. 1969). See also Lambert v. Wainwright, 513 F.2d 277 (5th Cir. 1975); McBride v. Estelle, 507 F.2d 903 (5th Cir. 1975). Thus, any federal habeas corpus petition raising claims not fully presented to all available state courts must be dismissed. See Burroughs v. Wainwright, 454 F.2d 1165 (5th Cir. 1972); Meachman v. Beto, 451 F.2d 187 (5th Cir. 1971); 28 U.S.C. §2254. In the instant case, petitioner has not presented ground three (3) to any state court. Thus, the petitioner has not exhausted his available state remedies as to one of the three grounds that his petition is presently raising before this court.

Furthermore, where a petitioner presents more than one claim in a petition for a federal writ of habeas corpus, failure to exhaust remedies of any of the claims require dismissal without prejudice of the entire petition until the exhaustion rule has been complied with as to all issues. A federal district

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1 Respondent notes this in his present Petition, the Petitioner alleges that ground (3) was raised in his direct appeal. It is clear from Exhibit "A", that ground (3) was not raised.

court must dismiss a state petitioner's habeas corpus petition if it contains both exhausted and non-exhausted claims. Rose v. Lundy, ___U.S.___, 102 S.Ct. 1198, 1199 (1982); Turner v. Wainwright, 550 F.2d 1012 (5th Cir. 1977); Galtieri v. Wainwright, 545 F.2d 942 (5th Cir. 1977).

2. Respondent also requests that this Court order the Petitioner to respond and state whether he intends to abandon the unexhausted speedy trial claim that he raised in his previous petition. Although the Petitioner is not raising the speedy trial claim in the present petition, he has not made an attempt to exhaust that issue before filing the present petition. Unless the Petitioner abandons the speedy trial claim forever, he would be engaging in the type of piecemeal litigation that constitutes an abuse of the writ under 28 U.S.C. §2254 Rule 9(b). In Rose v. Lundy, ___U.S.___, 102 S.Ct. 1204, 1205, the United States Supreme Court addressed this issue by stating:

> The prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims. A total exhaustion rule will not impair that interest since he can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims. By invoking this procedure, however, the prisoner would risk forfeiting consideration of his unexhausted claims in federal court. Under Rule 28 U.S.C. §2254 Rule 9(b), a district court may dismiss subsequent petitions if it finds that failure of the petitioner to assert those [new] grounds in a prior petition constituted an abuse of writ. . . . Thus a petitioner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions. [citations omitted].

The district courts in the Southern District of Florida have required petitioners who file successive petitions with non-exhausted state claims and exhausted state claims to abandon the non-exhausted claims if they wanted to court to hear the exhausted claims on the merits. In William B. Dillingham v. Louis L. Wainwright, Case No. 76-451-Civ-JLK, the petitioner filed a petition for a writ of habeas corpus which was dismissed for failure to exhaust available state remedies. The petitioner

then filed a different petition, raising an issue that was one of the several issues raised previously. The petitioner had not made an attempt to exhaust the other issues in the prior petition. Judge King in an order dated May 28, 1976, held that the petitioner could not engage in piecemeal litigation regarding all the issues he had indicated a desire to litigate in a federal habeas corpus proceeding. In order to prevent an abuse of the Great Writ and avoid iminent piecemeal litigation, the petitioner had to indicate whether he intended to abandon forever those grounds for relief asserted in his prior petition, but not asserted in the instant petition. (See Exhibit "E").

Respondent therefore respectfully submits that the petitioner should be required to state whether he intends to abandon his speedy trial claim asserted in his prior petiton. In addition, the Respondent submits that the petition should be dismissed without prejudice to the petitioner to properly exhaust all of his state court remedies with respect to all of the claims that he has presented to this Court.

3. In the event that this Court should disagree with Respondent's position on exhaustion of state remedies, then the respondent respectfully requests this Court to allow the Respondent to file a memorandum of law addressing the merits of the issues within a reasonable time after such determination.

WHEREFORE, the respondent respectfully requests that the petition for writ of habeas corpus be denied.

Respectfully submitted,

JIM SMITH
Attorney General

Penny H Hershoff

PENNY H. HERSHOFF
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION TO DISMISS AND/OR EXTENSION OF TIME AND MEMORANDUM OF LAW was furnished by mail to MICHAEL HUTCHINS, #053170, Cross City Correctional Institute, Post Office Box 1500, Cross City, Florida, on this 10th day of June, 1982.

PENNY H. HERSHOFF
Assistant Attorney General

ph/

IN THE U[illegible]D STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-0420-Civ-JE

MICHAEL HUTCHINS,
Petitioner,
vs.
LOUIE L. WAINWRIGHT, as Secretary, Department of Corrections, State of Florida,
Respondent.

NOTICE OF ELECTION OF REMEDIES

The petitioner, Michael Hutchins, by and through undersigned counsel, files this notice of election of remedies pursuant to the order of this Court entered September 16, 1982 in the above-styled cause, and states:

1. The first petition for writ of habeas corpus filed by petitioner (Case No. 78-3264-Civ-NCR) alleged four grounds for relief: 1) denial of a speedy trial; 2) exclusion by the trial court of favorable evidence; 3) failure of the prosecution to disclose favorable evidence; and 4) unconstitutional admission by the trial court of hearsay evidence. On September 24, 1979, this Court dismissed the petition without prejudice, finding that the second and fourth claims had been presented to the state appellate court on direct appeal, but that the first and third had not.

2. The present petition presents three grounds for relief: 1) the exclusion of testimony by the trial court; 2) unconstitutional admission by the trial court of hearsay testimony; and 3) failure of the prosecution to disclose favorable evidence. The motion to dismiss filed by respondent concedes that the first and second grounds have been properly presented to the state courts and are exhausted claims subject to federal habeas corpus review, but asserts that the third ground has not been properly presented, rendering the petition subject to dismissal without prejudice pursuant to Rose v. Lundy, ___U.S.___, 102 S.Ct. 1198 (1982). Respondent further alleges that petitioner should be required to state his intentions regarding the unexhausted speedy trial claim

SEP 16 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-0420-Civ-JE

MICHAEL HUTCHINS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ORDER

Elliot H. Scherker, Esq., having communicated his willingness to appear in this cause as counsel for Petitioner, it is now Ordered:

1. Within forty-five (45) days he shall file his Notice of Appearance, and his Announcement of those grounds upon which Petitioner seeks to proceed or which he waives or discards, and such other Memoranda as he may choose.

2. Ruling upon any defensive Motion is deferred.

In Miami, Florida, September 16, 1982.

Peter L. Nimkoff
PETER L. NIMKOFF
UNITED STATES MAGISTRATE

Copies to:

Penny Hershoff, Esq.
Michael Hutchins
Elliot Scherker, Esq.

7

presented in the first petition for writ of habeas corpus.

3. The speedy trial claim was raised in the state courts by a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. A copy of the motion is appended hereto, and it reflects that the claim was essentially raised under Rule 3.191 of the Florida Rules of Criminal Procedure, the state speedy trial provision, and not as a federal constitutional issue. Petitioner has authorized the undersigned to state that he does not intend to seek federal habeas corpus relief on this claim, either in the present proceeding or in a subsequent action.

4. The third claim in the present petition, that the prosecution failed to disclose favorable testimony, was also raised in the first petition. A reading of the claim as drafted by petitioner in the two petitions suggests that it is a variation on the exhausted confrontation/hearsay claim. Petitioner has so advised the undersigned, and explained that he was attempting to state similar grounds, i.e., that the prosecution introduced the statements of an undisclosed informant. Petitioner has authorized the undersigned to state that, to the extent that this claim recites an independent basis for federal habeas corpus relief under the Due Process Clause of the Fourteenth Amendment, see, e.g., Brady v. Maryland, 373 U.S. 83 (1963), such claim is hereby abandoned.

5. Petitioner will accordingly proceed before this Court upon the following two claims:

A. The exclusion by the trial court of relevant and material exculpatory evidence offered by petitioner, in violation of the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

B. The admission by the trial court of incriminating out-of-court statements of an unidentified and undisclosed informant, in violation of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1351 N.W. 12th Street
Miami, Florida 33125

BY: ELLIOT H. SCHERKER
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing notice was mailed to Penny Hershoff, Assistant Attorney General, 401 N.W. 2nd Avenue, Miami, Florida this 19th day of October, 1982.

ELLIOT H. SCHERKER
Assistant Public Defender

FILED by ____ D.C.

OCT 25 1982

CLERK, U. S. DIST. CT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-0420-Civ-JE

MICHAEL HUTCHINS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, et al.,

Respondent.

O R D E R

Mr. Scherker's appearance as counsel to Petitioner is approved. Mr. Wainwright is substituted as Respondent. The cause will proceed on two claims only:

(a) The exclusion of evidence of another ostensibly similar crime;

(b) The admission of testimony and arguments regarding an unidentified informant.

On these questions the Respondent is invited to file and serve any further Memorandum (if counsel feels one is required) on or before November 22, 1982.

Argument on these questions is hereby scheduled for Monday, November 29, 1982, at 4:00 p.m. (thirty minutes to each side). If the parties desire a court reporter, they shall make those arrangements.

In Miami, Florida, October 25, 1982.

PETER L. NIMKOFF
UNITED STATES MAGISTRATE

Copies to:

Elliot Scherker, Esq.
Penny Hershoff, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-0420-Civ-JE

MICHAEL HUTCHINS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, as Secretary, Department of Corrections, State of Florida,

Respondent.

MEMORANDUM OF LAW IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

The Respondent, Louie L. Wainwright, by and through his undersigned counsel, files this Memorandum of Law in Opposition to the Petitioner's Petition for Writ of Habeas Corpus, in response to this Court's Order of October 25, 1982, as states as follows:

I.

PROCEDURAL HISTORY

Respondent has previously filed several exhibits with its Motion to Dismiss, which in order to avoid confusion, will be referred to as the Petitioner has done in his memorandum: The symbol "R" will designate the record on appeal, filed as a part of Exhibit F; the symbol "SR" will designate the supplemental record on appeal included within the same exhibit; and the remaining exhibits will be referred to by their corresponding letter designation.

2. As stated in Respondent's Motion to Dismiss, the Petitioner is presently in custody of Louie L. Wainwright, Secretary, Department of Corrections, State of Florida, pursuant to a valid judgment of guilt entered by the Circuit Court of Dade County, Florida, Criminal Division, Case No. 75-7951. The Petitioner on April 15, 1976, after a trial by jury was convicted of robbery and an assault with intent to

commit second-degree murder. (R.259). Petitioner was sentenced to a term of twenty (20) years imprisonment on the robbery conviction, and to a term of ten (10) years in the state penitentiary on the assault conviction, this latter sentence to run concurrently with the sentence imposed for robbery. (R.261).

3. Petitioner appealed his conviction to the District Court of Appeal, Third District, raising two grounds: (1) that "the trial court erred in excluding the testimony of the only defense witness on the ground of irrelevancy where the defendant proferred that this testimony was relevant to the identity of the perpetrator of the crime and would exculpate the defendant, thereby violating the defendant's due process right to prepare and present a defense under the Sixth and Fourteenth Amendments to the constitution of the United States..." and (2) that "the trial court erred in allowing prosecutorial comments regarding the investigating officers encounters with an unidentified third person to pervade the entire trial, where the only purpose of this argument was to lead the jury to draw the impermissible inference that this third person had identified the defendant as the perpetrator of the charged crime, but was afraid to testify in court." See Exhibit "A", Points I and II on Appeal. The Petitioner was represented by counsel on his direct appeal.[1] The Third District Court of Appeal, per curiam affirmed the Petitioner's conviction, without an opinion. Hutchins v. State, 349 So.2d 1237 (Fla. 3d DCA 1977).

4. Subsequently, Petitioner filed a motion for post-conviction relief, pursuant to Rule 3.850 of the

[1]Petitioner's counsel on his direct appeal is the same counsel who is presently representing him on the instant petition.

Florida Rules of Criminal Procedure, alleging a violation of his state right to a speedy trial. The motion was denied by the trial court on January 9, 1978. (See motion and order attached to Petitioner's Notice of Election of Remedies.) No appeal was taken from the denial of the motion.

5. Petitioner, later filed a Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254, in the United States District Court, Southern District of Florida, Case No. 78-3264-Civ-NCR. (Exhibit "C"). In said Petition, Petitioner raised four grounds, (1) the denial of the right to a speedy trial, (2) the conviction was obtained by the unconstitutional failure of the court to disclose evidence favorable to the defendant, (3) the conviction was obtained by the unconstitutional failure of the prosecution to disclose evidence favorable to the defendant, and (4) the conviction was obtained by the court's unconstitutional act of letting hearsay evidence in, which was only favorable to the prosecution. The petition was dismissed by the district court for failure to exhaust state remedies as to issue number 1, the denial of the right to a speedy trial, and issue number 3, the failure of the prosecution to disclose evidence favorable to the defendant. See Exhibit "D". The dismissal was without prejudice so that Petitioner could exhaust his state remedies.

6. On March 2, 1982, the present Petition for Writ of Habeas Corpus was filed. Petitioner has alleged three grounds for relief: (1) the trial court denied the defense counsel's request to produce a witness who could exculpate the defendant, in violation of the Sixth Amendment; (2) that his conviction was obtained by the unconstitutional act of allowing "hearsay evidence" to be admissible, and (3) that his conviction was obtained by the unconstitutional failure of the prosecution to disclose evidence favorable to the defendant.

7. In response to the petition, the Respondent filed a motion to dismiss, conceding that the first and second grounds had been properly presented to the state courts, but asserting that the third ground had not been properly presented, rendering the petition subject to dismissal without prejudice pursuant to Rose v. Lundy, ___U.S.___, 102 S.Ct. 1198 (1982). Respondent further requested that the Petitioner state his intentions regarding the unexhausted speedy trial claim. The Petitioner, in response, has filed a Notice of Election of Remedies, forever waiving his claims as they relate to a violation of his right to a speedy trial and as a violation of the Due Process Clause of the Fourteenth Amendment, see, e.g., Brady v. Maryland, 373 U.S. 83 (1963). Petitioner then filed a memoradum of law in support of his petition, proceeding upon the following two claims:

> A. The exclusion by the trial court of relevant and material exculpatory evidence offered by petitioner, in violation of the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.
>
> B. The admission by the trial court of incriminating out-of-court statements of an unidentified and undisclosed informant, in violation of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

II.

ARGUMENT

A. Petitioner has waived his claim that the admission by the trial court of incriminating out-of-court statements of an unidentified and undisclosed informant, violated the Confrontation Clause of the Fourteenth Amendment to the Constitution of the United States or in the alternative Petitioner has not exhausted this claim.

During the trial in this cause, the prosecutor proferred during his opening statement the details of the investigation by the police officers into the offenses in this case. Included in this proffer was the testimony of Detective Purdy to the effect that Detective Purdy had a conversation with a young black male who later gave information to the police which led them to the arrest of the Petitioner. (R.22-26). Counsel for the Petitioner objected at this point on the ground that the prosecutor was referring to inadmissible hearsay evidence, especially in light of the fact that counsel was unable to find out who the young black male was and to question him. (R.23). During Detective Purdy's testimony, counsel renewed his objection. (R.88). Detective Shipes was also permitted to testify concerning a meeting with a young black male, that led to the area of 1840 Northwest 60th Street. (R.101). Defense counsel again moved for a mistrial. (R.102). During closing argument, the prosecutor referred to the meeting between Detective Shipes and the unidentified black male. (R.166).

On direct appeal, counsel for the Petitioner asserted as one of his points on appeal that "the trial court erred in allowing prosecutorial comments regarding the investigating officers encounters with an unidentified

third person to pervade the entire trial, where the only purpose of this argument was to lead the jury to the impermissible inference that this third person had identified the defendant as the perpetrator of the charged crime, but was afraid to testify in court." See Exhibit "A", Point II on Appeal. In support of this allegation of error, the Petitioner cited state cases that admonished prosecutors from making comments that could not be reasonably inferred from the evidence or which was inflammatory and calculated to raise passion or prejudice in the minds of the jury. See Exhibit "A", Brief of Appellant at 22-24. Although, Petitioner's trial counsel had objected to the introduction of the evidence relating to the unknown black male, as hearsay, Petitioner's appellate counsel never once couched the claim in terms of a violation of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. Likewise, the State's brief cited state cases concerning prosecutorial comments and did not address the issue in terms of a violation of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. See Appendix "B", Brief of Appellee at 16-28. Thus it is quite evident that the Petitioner's second claim, that of a violation of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment has never been presented to the state appellate court for review.

Respondent submits that this failure to fairly present this issue to the state courts is not one of non-exhaustion,[2] but rather one of waiver under the doctrine of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977). In Wainwright, the United States Supreme Court held that

[2]The Respondent is asserting that the Petitioner has waived this claim, but if this Court finds there has been no waiver because the Petitioner still has a state remedy, then Respondent asserts in the alternative, that this claim is unexhausted. See infra at 9-10.

failure to make a timely objection under Florida's contemporaneous objection rule to the admission of his inculpatory statements, absent a showing of cause for the noncompliance with the procedural rule and some showing of actual prejudice, bars federal habeas corpus review of the defendant's Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966) claim. This cause and prejudice requirement of Wainwright v. Sykes has been extended to include claims which the defendant has failed to include on direct appeal in compliance with state procedural appellate requirements. See, e.g., Wright v. Bombard, 638 F.2d 457 (2d Cir. 1980); Forman v. Smith, 633 F.2d 634 (2d Cir. 1980); Cole v. Stevenson, 620 F.2d 1055 (4th Cir. 1980); Evans v. Maggio, 557 F.2d 430 (5th Cir. 1977); Carter v. Scully, 533 F.Supp. 257 (S.D.N.Y. 1982).[3] Respondent submits that Wainwright v. Sykes is applicable to the instant case because under state procedural rules, the Petitioner would be precluded from raising the Confrontation Clause issue on collateral review. See, e.g., Engle v. Isaac, ___U.S.___, 102 S.Ct. 1558, 1570 n.28 (1982). Under Rule 3.850 of the Florida Rules of Criminal Procedure, the Petitioner would be precluded from raising this issue, because it is a matter which could have been raised on direct appeal. Florida courts have consistently held that issues which could have

[3]But see Crick v. Smith, 650 F.2d 860 (6th Cir. 1981) in which the Sixth Circuit held that the Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822 (1963) standard of "deliberate by-pass" rule, rather than the "cause and prejudice" rule of Wainwright v. Sykes, supra, is applicable to procedural default on direct appeal. Respondent submits that the court's reliance on Chief Justice Burger's concurring opinion in Wainwright v. Sykes in which he stated that because a decision to appeal is made upon consultation and approval of the defendant, Fay v. Noia would be applicable, is misplaced. Although the decision to appeal may be the defendant's, the decision as to which issues to pursue are normally left to the discretion of the attorney. Thus, there is no reason to distinguish decisions to make contemporaneous objections at trial with decisions to appeal certain issues and not others. Therefore, the Respondent submits that Wainwright v. Sykes is the applicable standard on the failure to present claims to the state appellate court on direct review.

been raised on direct appeal from the conviction will not support a subsequent collateral attack by way of a motion for post-conviction relief. See, e.g., Alvord v. State, 396 So.2d 184, 191 (Fla. 1981); Adams v. State, 380 So.2d 423, 424 (Fla. 1980); Harvey v. State, 383 So.2d 770, 771 (Fla. 3d DCA 1980). Thus, Respondent submits that because Petitioner's Confrontation Clause claim is foreclosed from state review due to procedural default, this Court must dismiss the Confrontation Clause claim absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation.

The Respondent asserts that Petitioner has not shown any cause for his failure to raise the Confrontation Clause issue on his direct appeal to the Third District Court of Appeal. Any allegations that appellate counsel was ineffective for failing to raise the issue on direct appeal must be rejected as insufficient reasons to satisfy the "cause" requirement. See, e.g., Washington v. Estelle, 648 F.2d 276, 278 (5th Cir. 1981); Lumpkin v. Ricketts, 551 F.2d 680, 683 (5th Cir. 1977). See also Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978)(en banc); Indiviglio v. United States, 612 F.2d 624 (2d Cir. 1979). It is not proper for federal courts to speculate on the possible reasons for a failure to follow procedural rules. Tyler v. Phelps, 643 F.2d 1095, 1100 (5th Cir. 1981). Furthermore, cause for a failure to follow state procedure cannot exist because the error "went to the central issue of guilt or innocence and infected the fairness of the trial itself. Tyler v. Phelps, supra, at 1101 n.9. Plain error cannot substitute for a failure to show cause. Engel v. Isaac, ___U.S.___, 102 S.Ct. 1558, 1575 n.43 (1982). See also United States v. Frady, ___U.S.___, 102 S.Ct. 1584 (1982). Thus, Respondent submits that the Petitioner having failed to show cause, it

is not necessary for this Court to determine if there was actual prejudice.[4] Therefore, this Court is barred from considering the Petitioner's Confrontation Clause claim as grounds for federal habeas corpus relief. See, e.g., Washington v. Estelle, supra at 278.

However, if this Court should find that a Wainwright v. Sykes, supra waiver is not applicable to the instant case, the Respondent submits that the Petition should be dismissed without prejudice for failure to exhaust his state remedies. As stated supra, a review of the brief filed by the Petitioner in his direct state appeal as well as the brief filed by the state, clearly shows that the claim that the Petitioner is now asserting, that the admission by the trial court of incriminating out-of-court statements of an unidentified and undisclosed informant, was in violation of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, has not been previously presented to the state courts with a fair opportunity to apply controlling legal principles.

The United States Supreme Court in Anderson v. Harless, ___U.S.___, 32 Cr.L. 4063 (November 1, 1982) recently held that the constitutional argument that a defendant relies upon for relief in a federal habeas corpus petition must be specifically presented to the state courts. It is not enough that all facts necessary to support the federal claim were before the state courts or that a similar state law claim was made. See also Thomas v. Wyrick, 622 F.2d 411, 413 (8th Cir. 1980). Alleging lack of a fair trial does not sufficiently alert the state court to a contention that the trial court failed to comport with due process guarantees.

[4]Respondent asserts that any error that occurred with the admission of the hearsay testimony was harmless beyond a reasonable doubt. See text infra at 19-21.

Kirksey v. Jones, 673 F.2d 58, 59-60 (2d Cir. 1982). The Respondent submits tht the Petitioner has not "fairly represented" to the state courts the "substance" of his Confrontation Clause claim. Thus, the Petitioner has failed to exhaust his state remedies. Rose v. Lundy, ___U.S.___, 102 S.Ct. 1198 (1982). Pitchess v. Davis, 421 U.S. 482, 98 S.Ct. 1748 (1975); Piccard v. Conner, 404 U.S. 207, 92 S.Ct. 509 (1971). See also Shane v. Iowa, 581 F.2d 727 (8th Cir. 1978).

Respondent would submit that his previous concession that the Confrontation Clause claim had been exhausted was erroneous. By raising the issue of exhaustion in this memorandum, Respondent has corrected his error and has not waived the defense of lack of exhaustion of state remedies. Hopkins v. Jarvis, 648 F.2d 981, 983 n.2 (5th Cir. 1981); Bufalino v. Reno, 613 F.2d 568, 570 n.2 (5th Cir. 1980). See also Davis v. Campbell, 608 F.2d 317 (8th Cir. 1979); United States v. Hatrack, 563 F.2d 86 (3d Cir. 1977).

Respondent asserts that because Petitioner has not exhausted his Confrontation Clause claim, the instant petition must be dismissed as a mixed petition. Where a petitioner presents more than one claim in a petition for a federal writ of habeas corpus, failure to exhaust remedies of any of the claims require dismissal without prejudice of the entire petition until the exhaustion rule has been complied with as to all issues. A federal district court must dismiss a state petitioner's habeas corpus petition if it contains both exhausted and non-exhausted claims. Rose v. Lundy, ___U.S.___, 102 S.Ct. 1198, 1199 (1982); Turner v. Wainwright, 550 F.2d 1012 (5th Cir. 1977); Galtieri v. Wainwright, 545 F.2d 942 (5th Cir. 1977).

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 82-0420 CIV JE

MICHAEL HUTCHINS,

Petitioner

vs.

LOUIE L. WAINWRIGHT,

Respondent.

300 Northeast 1st Avenue
Miami, Florida
November 29, 1982
4:00 p.m.

The above-entitled cause came on for hearing before the Honorable Peter L. Nemkoff, pursuant to Notice.

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APPEARANCES:

PENNY H. HERSHOFF
Assistant Attorney General
Attorney General's Office
Miami, Florida
On behalf of the Petitioner

BENNETT H. BRUMMER
Public Defender
By: ELLIOT H. SCHERKER
Assistant Public Defender
Public Defender's Office
On behalf of the Respondent.

THE COURT: Mr. Scherker, Mr. Hutchins now presses two claims which I hope I accurately identified in the order which is set for today.

Do you wish to argue both?

MR. SCHERKER: Yes, sir.

THE COURT: Go ahead, sir.

MR. SCHERKER: If the Court please, we're before the Court on two claims.

The first is the exclusion of provative evidence offered by Mr. Hutchins' counsel at trial.

Secondly, the admission of hearsay statements or the essence of hearsay statements of an unidentified informant who allegedly inculpated Mr. Hutchins.

Now, previously the Respondent has in its memorandum filed November 22nd, raised procedural arguments regarding the second claim which I'd like to briefly address before I reach the merits of our issues.

The State's argument in essence is that we are barred from proceeding under Engle vs. Issac or alternatively have failed to satisfy the exhaustion doctrine.

The basis for both of these claims appears on page six of the State's memorandum. It is essential that the confrontation issue was not properly raised before the State Appellate Court.

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From their premises, the State argues first that we are barred from proceeding and have waived the claim under Engle vs. Issac and Wainwright vs. Sykes because of State procedural default.

Dismissal with prejudice is sought on this claim on that basis. On the alternative, we have failed to exhaust our State remedies because of the insufficiency of the Federal claim to the State court requiring a dismissal without prejudice.

THE COURT: The State filed one November 22nd? If one was filed so recently, it has not come to me. Perhaps the State will hand up another copy.

MS. HERSHOFF: I have another copy. I did hand deliver it to your office.

THE COURT: I'm sorry, unless it is one which I did -- I beg your pardon. I have it. I had not realized that it was the one most recently filed. I do have it.

Yes, sir, it's not clear to me exactly what position the State takes with regard to the second claim, which you wish to present here. Is it seeking to tell me that it was not raised before the District Court of Appeals?

MR. SCHERKER: That's correct, Judge, from that, both --

THE COURT: Is it true that it was not raised?

MR. SCHERKER: The essence claim was raised.

THE COURT: I say that because I had thought from my prior recollection of the file that that claim was asserted from the Third District Court of Appeals.

MR. SCHERKER: Our history starts with the history of this Court which may be at some length.

First, the petition filed by Mr. Hutchins was filed pro se under Case 78-3264. It was before Judge Rutger. At that time four claims were raised; a speedy trial claim, an exclusion of evidence claim which regards what is literally called a reverse Williams claim in this proceeding alleging nondisclosure of favorable evidence. Apparently speaking to Brady vs Maryland and the unconstitutional admission of the hearsay.

Judge Rutger on the State's motion entered an order of dismissal which is dated November 24, '79. It's appended to the State's initial response to the Court's order to show cause as Exhibit D.

The first page of the order specifies the four claims numbered one, two, three and four. Two and four are claims that are before this Court in this proceeding. The order finds -- I'm quoting -- "Hutchins raised the substantial equivalent of numbered issues two and four on direct appeal to the Third District Court of Appeals of Florida, which confirmed, I assume, that affirmed his

conviction."

That the second page of the order, "It is evident that although Hutchins has exhausted the State's remedy to the two of the four remedies raised in the petition, it has not exhausted as to the first and third claim." Apparently, this was entered in the file. I say apparently because I checked the Court file. The State's motion to dismiss is not in the Court file and I say, apparently, because of the way the order reads and because that was the position the State took initially in this proceeding.

In any event, the State would not appeal that order which it would have had a right to do if it was, in fact, adverse to the State's position. Initially, we have submitted that res judicata on any issue as to whether or not the substantial equivalent of the second issue was raised.

THE COURT: Had Judge Rutger not so ordered, were the res judicata not available to you, you would say that that, in fact, in any event the claim was asserted before the Third District?

MR. SCHERKER: I don't get to that issue because the State's conduct in this litigation is the next step of our argument, if I might?

The State's initial memorandum in response to

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the order to show cause was essentially a motion to dismiss on procedural issues and request the Court for leave for an extension of time to address the merits.

In that pleading at pages two and three, the State specifically again represents that the substantial equivalent of issues two and four, again, the two issues we're before the Court on now, now two and three -- I beg your pardon, ground one and ground two in this proceeding. Mr. Hutchins can raise a speedy trial claim initially, which he has since abandoned.

Reading from page two of the State's initial memorandum which is filed and a motion to dismiss or extension of time for memorandum of law. The Petitioner appeals this conviction to the Third District Court of Appeals and raises a subsequent issue -- I assume this is substantially two of the four grounds -- actually two of the three grounds which they are presently raising in this habeas corpus petition.

Ground one is the exclusion of the defense witness on the basis that his testimony was irrelevant. Ground two is the admission of hearsay evidence at his trial.

Again, their petition notes Judge Rutger's order on proceedings. Then, at page three of these three grounds, only two grounds, ground one and two,

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again, the two grounds we're before the Court on now, have been presented to both State trial and Appellate courts which considered and rejected them.

The State's initial position was then to waive whatever procedural arguments it may have had. Of course, the authorities are well established, the Fifth Circuit authority that the State has a right to and can and will be held to waivers of procedural arguments.

The cases I primarily relied on for that proposal are Collins vs. Estelle at 474, F.2d, 98A; Houston vs. Estelle, 569 S.2d, 372 and Messelt vs. Alabama, 559 F.2d, 247.

The case mine is most analagous to is LaRoache vs. Wainwright, 599 F.2d, 722 at Page 725 in dismissing a similar procedural status, the court held: "We need not reach the State's procedural arguments because they have waived hereby a failure of raising them either in the first federal habeas proceeding that was dismissed for a failure to exhaust State remedies or the second dismissal after LaRoache has been denied relief by the State court."

Assuming that I am correct that the State did not assert the first habeas procedures, that the State has not exhausted State remedies, regardless of the findings of Judge Rutger, they're barred. The State

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agreed with that order that they have the right to appeal.

Finally, I have urged a form of equitable estoppel at the time Mr. Hutchins was requesting to state our preference as to forum and grounds. The State's litigation was that the State had abandoned any procedural arguments which might have been. We have predicated upon those decisions and the State should be held in.

In weighing the equities which are involved in both waiver and exhaustion since both are essentially both essentially spring from the same policy, I'd like to note the exhaustion really is not at issue in this case. The Petitioner has no available State remedies at this point as the Respondent correctly points out in his memorandum of law.

State post conviction is unavailable if the issues are raised on direct appeal. If they could have been raised on direct appeal. There are no availalle State remedies.

Footnote 28 of the Engle decision, the Supreme Court specifically held that a petitioner who's in the position of not having State post conviction available under law very similar to Florida, has for all practical purposes and as a matter of law, quote, unquote, exhausted available State remedies because there are none.

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So, the question really in terms of the State's procedural posture, should Mr. Hutchins be forever barred from seeking habeas corpus relief from under Section 2254 based upon what is a claim to be a failure to raise the issue on direct appeal which he would like to address.

The merits of the claim in a balance of the appropriate equities, just briefly. Our claim on direct appeal, referring to Page 20 of the Appellee's brief, which is appended to the State's response, its initial response, is, I quote:

> "The trial court erred in allowing prosecutorial comments regarding the investigating officer's encounters with an unidentified third person to pervade the entire trial, where the only purpose of this argument was to lead the jury to draw the impermissible inference that this third person had identified the defendant as the perpetrator of the crime but was afraid to testify in court."

The argument was that the prosecutor essentially urged the jury to accept as true these, quote, unquote, statements, the essence of these statements as evidence

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of guilty and, essentially, argued you would believe this testimony if I'd been able to present this witness, but he's afraid to testify.

Lo and behold, when the officers went to arrest Mr. Hutchins, where did they find him? The same address they had driven to the unidentified informant. The prosecutor urged the jury that the witness didn't come in because he was afraid to testify. Confrontation claim. Relying upon through a witness whom the Defendant has no opportunity to cross examine at trial.

THE COURT: Putting aside the question on the various sides, the State is estopped to argue, otherwise I would be curious to hear the argument. The second claim that you now seek to press in this Court was not presented to the Third District Court of Appeals because I have your brief there. And their similarity is remarkable.

MR. SCHERKER: It's our point -- it's our position, although book and verse is not cited in the brief, the essence of the claim, not just the facts in the claim, the essence of what we're asserting here was asserted before the District Court of Appeals.

And there was one other issue in this regard I would like to briefly touch on. To the extent that the failure to cite book and verse of the Constitution to

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the extent that the use of the confrontation clause does not appear in the brief, and to the extent that Engle would then apply, Engle is, of course, a trial rule. The failure to apply the preservation of rules at trial. Where a State court relies upon the procedural default to reject the claim will bar federal habeas corpus review.

The Respondent's memorandum notes that the applicability of this rule to alleged defaults on appeal are open to some question. There was some authority for the proposition in Favre vs. Henderson and Engle vs. Issac, at least Chief Justice Burger said that Sykes suggests that we're talking about appellate proceedings, as the Respondent correctly notes, however, it's irrelevant whether we are by-passing cause and prejudice.

In essence, the State Appellate Court approved by its procuring opinion the tactics of the prosecutor in urging his testimony to be true, in urging the jury to rely on it for its truth. It's a subject that the Court would have held that the introduction of the evidence upon which a non-hearsay evidence or allegedly not introduced at all upon which the prosecutor based his argument would be erroneous, that would invoke the rules of Henry vs. Wainwright, 661 F.2d, Page 56A and the second Henry case, 68687, 311.

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The Henry issues involved a claim by the State of whether or not to object to the introduction of certain evidence at a death penalty sentencing hearing, but did not object to the introduction regarding that evidence that was barred under Sykes. The Court in the first Henry decision rejected that claim because it said the Defendant's counsel had objected to the introduction of the evidence and it would be futile under Florida law, well established Florida law, for the attorney to continue to repeat the objection. Therefore, he wasn't barred.

Essentially, Henry was taken to the United States Supreme Court, which granted certiorari and vacated Henry in light of the subsequent decision in Engle vs. Issac.

In Engle vs. Issac, there is a law, what the court called futility. Briefly, that what the State would be asserting was insufficient to get around the procedural bars of that decision.

After reconsidering the case and in light of Engle vs. Issac, the former Fifth Circuit reached the exact same conclusion noted in the second Henry case, footnote three:

"The futility we're talking about is when you voice an objection and it's overruled,

you don't have to keep repeating it."

Applying that to the appellate context, what we have is a court that approved of the prosecutorial tactic of urging the jury to buy that testimony as true and applying the same trial rules to the appellate context, that would clearly have been futile to urge that the testimony wasn't properly introduced in the first place.

I make these comments because the important point is that the State, at very best, would have a tenuous, highly tenuous Issac vs. Idden (phonetic) claim which is all the more reason to bind to Judge Rutger's finding in what has been a consistent waivers respect position. No substantial injustice is done at this stage of the claim.

THE COURT: It's pretty clear to me that this claim is ripe.

MR. SCHERKER: I would like to address the merits of the claims.

THE COURT: Yes.

MR. SCHERKER: First claim is the exclusion of what we submit was highly relevant, provative testimony.

Briefly, the offense involved a cab driver who was dispatched to the Veteran's Hospital here in Miami. He was directed to Northwest 22nd Avenue and 61st

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Street. He was robbed by a man at knife point who he identified from a photographic array which was displayed while in the hospital. There was never any live line-up.

What the court concluded was evidence of another offense approximately one month earlier in which the driver of the same cab company was called to the Veteran's Hospital, directed to 22nd Avenue and 61st Street, the same location, and robbed at knife point.

This individual also identified Mr. Hutchins when he was shown a photographic array.

He is then shown a line-up in which Mr. Hutchins is present. He identified the robber as having been one of two other people. He picked two people out that looked like the robber. He did not identify Mr. Hutchins.

The Respondent concedes that the Defendant is entitled to prove his innocence by showing the guilt of another. This includes the right to present evidence of other similar crimes submitted by -- was this evidence probative under those rules? That's the sole dispute.

Florida's leading decision is the Williams decision, so called collateral crimes can be submitted as guilt. This rule is equally applicable to a defendant. And when we're talking about a federal habeas review of State evidentiary ruling, it's critical to know

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exactly what the State evidentiary law is.

Moreno, which is cited in split form, it's now reported at 418 S.2d, 1223, it states Page 1225 in which it adopts the exact role which was involved in this case.

"Where evidence tends in any way even indirectly to prove a defendant's innocence, it is error to deny its admission."

The court then goes on to adopt the so called reverse Williams Rule.

THE COURT: If permitted by the trial judge, whom would you have called on this point?

MR. SCHERKER: Mr. Lowell Lewis, who was the victim of the other offense.

THE COURT: The first cab driver?

MR. SCHERKER: That's correct.

THE COURT: You would have established through him his assertion that he was robbed at knife point under the circumstances you described and you believe his admission that at a photo line-up he selected Mr. Hutchins and that at a live line-up he did not select Mr. Hutchins; he selected instead either of two other persons?

MR. SCHERKER: That's correct.

THE COURT: And what is the probative value of that if admitted?

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MR. SCHERKER: Several respects.

First, it would provide a basis to argue that a robber in the collateral crime and in this crime had the same modis operandi and was one of those two other men.

Secondly, it would have provided a basis to argue that it was somebody besides Michael Hutchins. The critical fact is not so much that he picked out one of two other people, but that he didn't pick out Michael Hutchins. He was faced with Hutchins and he said it was one of those two other people.

It would provide a basis to argue either of those things.

We have two identical robberies committed in a very uniquely similar way. There was no doubt that if Michael Hutchins had been identified by Mr. Lewis, that the State would have been able to introduce that testimony at Michael Hutchins' trial as evidence of guilt.

The fact that he was not identified by Mr. Lewis switches it around. It's equally probative evidence of innocence that somebody else was committing the same kind of robbery, whether it was one of those two men or not that Mr. Lewis selected at the live line-up. It was not Mr. Hutchins.

There was one additional circumstance in this

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case. Bear in mind the conditions under which the victim in this case identified Mr. Hutchins in the photo line-up.

He was in the hospital. He had been badly wounded. He was under sedation. He was apparently semi-coherent to the extent that he thought he was shown two sheets of photographs. In fact, he was shown one, and under those circumstances, he identified Michael Hutchins. He was never shown a live line-up.

THE COURT: At trial he identified him again?

MR. SCHERKER: Naturally. And I don't know how much weight a jury is going to give that kind of identification. I usually don't expect someone to identify somebody else in the courtroom besides the individual that is sitting next to the attorney.

Of course, his identification is readily subject to challenge as of course he's going to identify Mr. Hutchins when he first sees him under these conditions.

But this individual, Mr. Lewis, who also picked Mr. Hutchins when faced with a live line-up, did not identify him in a courtroom situation, but a neutral line-up situation, but provided a basis to challenge the initial line-up situation.

THE COURT: As opposed to the manner in which

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Mr. Hutchins was not identified by Mr. Lewis.

Now, the only evidence of guilt was Mr. Preston's testimony. There was no corroborating evidence. There was no fingerprints that were taken of Mr. Hutchins at trial. The identification as I've said while certainly legally sufficient evidence of guilt, was not overwhelming evidence of guilt, particularly, in light of the circumstances under which the initial identification was made.

You say that given the Williams rule and the fact of Florida law now and since, established its reciprocity? Then, the Constitution is a matter of an equal protection clause that requires that a defendant be permitted, under appropriate circumstances, the offer which was made at that trial.

MR. SCHERKER: No.

THE COURT: What was the federal constitutional compulsion for the admission of that evidence which was excluded?

A mere State error would have sufficed.

MR. SCHERKER: It's relevant evidence. Other courts besides Florida, including the federal courts, have uniformly recognized that it's relevant evidence. Had Florida never expressed it one way or the other, it's true on this rule it would still be relevant evidence.

The federal court has a right to independently

conclude that relatively independent.

If Florida barred him then, we would be litigating the rule under Spencer vs. Texas. We're not litigating that. We're universally recognized as relevant evidence. Florida recognized it as relevant evidence. Florida did not let Michael Hutchins present it at trial. That's a --

THE COURT: Relevant evidence cannot be excluded without violating the compulsory process clause. The fact that Florida allows it into evidence only means that we're not arguing here or quibbling about Constitutionalizing rules of evidence or any arguments of that nature.

If Florida had a different rule, then, federal court, if it found that rule reasonable, might not be entitled to interfere with the State prosecution. That's again a totally different issue.

Florida recognized that any evidence which proves innocence, however indirectly, is admissible, unless it can be found to be harmless error because of overwhelming evidence of guilt.

This is a Constitutional violation provision to the second issue: The confrontation clause restricts the restriction of hearsay evidence and out of court statements of the State court.

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Mr. Scherker, what I propose to do on the second issue is let the State argue for a moment including such points as it wishes, to reserve you a few minutes if it should prove necessary and let them try to carry the burden on them. Because I'm skeptical on the first point, perhaps more so than I ought to be, and relatively persuaded on the second.

MR. SCHERKER: Thank you, Judge.

MS. HERSHOFF: May it please the Court, Penny Hershoff, Assistant Attorney General.

I understand the Court from hearing your comments before, is in agreement with the Petitioner on our argument that the second claim, the claim about the confrontation clause, has not been waived or alternative has been exhausted?

THE COURT: Well, I start with the proposition that it seems to me that the essence was argued to the Third District Court of Appeals back in 1976.

If that is not so, Mr. Scherker, it seems to me, makes a persuasive case that if the claim which Mr. Hutchins unsuccessfully asserted that to the Third District, was sufficiently distinct from the one which he now makes, then, it would appear to me, though I don't think that's so, then, it would appear to me that the State has waived that by its motion prior to

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this month and several habeas corpus proceedings and alternatively by Judge Rutger's order.

MS. HERSHOFF: If I address, initially, Your Honor as far as the exhaustion part, and I first got this case -- I don't mean to claim ignorance -- but I had just started with this office, to be honest with Your Honor, I had maybe an erroneous concession that had been exhausted.

THE COURT: I'm not sure it was erroneous.

MS. HERSHOFF: Only erroneous if this Court finds this has not been waived.

My initial argument is it has been waived, therefore, it has been exhausted. The State's position is that the Defendant cannot go back on Rule 3.850 and raise his claim because in Florida courts those claims that have been brought on direct appeal cannot be raised on a motion to vacate.

THE COURT: Starting with the proposition that it appears to me that, in fact, the same count appears now raised by Mr. Hutchins. I reread a number of times the six or seven pages by which that point two is raised in 1976 before the Third District. It's very clear.

The Third District had before it certain of the Public Defenders that the State had been permitted

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by the State trial judge to persuade a jury of the Defendant's guilt by repeated reference to the young black man in pointing out the complicity of the Defendant.

The closing remarks of the Third District, the Defendant's reply case. What he was arguing was, in fact, after the proseuutor made comments on the evidence that that was not before the jury impermissible because he states how the prosecutor made a comment that you should look beyond what's before the jury. This is the tip of the iceberg. You should consider other things.

So, what he's arguing is two different things. The Third District, he's saying that the prosecutor is arguing things that were not before the jury. Now, he's saying no, the jury has got to hear that type of evidence.

THE COURT: They're awfully close.

MS. HERSHOFF: Different Constitutional claims.

The first claim is a Fifth Amendment due process claim, the right to a fair trial. All the cases he cites, all the prosecutorial comments.

THE COURT: During the course of trial, the Defendant objected to the reference of a young black male and made three motions for a mistrial.

The brief at the bottom of 21. No, I just -- save your breath. I tell you very flatly, I find that

this was before the Third District Court of Appeals and I find that the State has waived the opportunity to say that it was not.

And, therefore, I will tell you now that I find for Mr. Hutchins and against the State on the grounds of waiver exhaustion or the like, and that the claim is ripe.

Let's proceed to the merits.

MS. HERSHOFF: Just for the record, the State objects to those findings on all counts.

THE COURT: Let's go to the merits.

MS. HERSHOFF: On the merits on the first issue on the exclusion of the testimony of Mr. Lewis, it's the State's position, as it was before the Third District, and perhaps a little different before it was a trial court, was that the testimony of Mr. Lewis would not be relevant and material to the defense of this case.

The testimony if you read the deposition --

THE COURT: You say it had no probative value?

MS. HERSHOFF: Absolutely. If you read carefully the deposition of Mr. Lewis, which was referred to in the trial court, so, it's part of the record in the trial court. It was part of the record in the Appellate Court.

It clearly shows that what Mr. Lewis was not

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able to identify anybody who committed the crime; that he stated, as I quote in my response, in his deposition when they talked about the photographic identification where he supposedly identified the Defendant, he says --

The question was to him, "Did you identify any of the people on that sheet of paper which were comprised of photographs?"

"Answer. Well, I pointed one out who I thought it might be, but it wasn't the right one."

Then at the line-up he testifies:

"Q Did you pick out two people in the line-up as being --"

"I said yeah, it looked like one of those two, but it wasn't, wasn't either one of those two."

"Q When you said one of the two men you identified in the line-up was the man that robbed you. That's what you actually thought at the line-up?"

"A That's what I thought."

Then, he said that he was told later by a detective that it wasn't a correct one. He had pointed out two different people.

He also stated that, "The man that robbed you

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on that occasion in June, have you seen him since the line-up?"

He goes, "Well, he was in the line-up, but I didn't recognize him. So, I saw him, but I didn't know it was him."

The whole thing gives you the idea.

THE COURT: Clearly in his deposition he was an uncertain witness, but taking the extracts which I just now read or paraphrased to be consistent with the reconstruction which Mr. Scherker has argued. That the witness initially identified Mr. Hutchins and then says that he thereafter came to recognize that was erroneous and at the line-up identified it as being one of several other people.

Thereafter, perhaps, did not know who it was.

MS. HERSHOFF: Your Honor, basically, the point is that he was not able to specifically say the Defendant wasn't the one who did it. It's the State's position that at that point, he became so confused he didn't know who did it, that very possibly that if he had put him on the stand that first conjecture of what happened would have happened --

THE COURT: It's not Mr. Scherker's fault. He sought to put him on the stand, or rather a colleague in the Public Defender's Office.

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MS. HERSHOFF: That's correct. It's the State's position and the Respondent's position that this evidence would not have shown directly or circumstantially that another person had committed the crime.

It was quite different from cases cited by the Defendant.

Holt vs. U.S., U.S. vs. Robinson, U.S. vs. Armstrong which in those cases you had specific testimony that would have, for instance, in Holt would have positively shown that the defendant had been mistakingly identified.

In two similar cases he was able to provide an alibi. Beyond a reasonable doubt in one of the other cases. You don't have that here.

THE COURT: The crimes are remarkably similar.

MS. HERSHOFF: There are definitely distinctions here too.

THE COURT: In the offense?

MS. HERSHOFF: Yes, sir.

THE COURT: What are the distinctions?

MS. HERSHOFF: The distinctions in this particular case, you have the victim in this case, Mr. Preston, testifying that an assailant was a young black male with braided hair who told during the ride from the VA Hospital to 22nd Avenue his problems with his VA and

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how he wasn't getting it.

He had a conversation with him for fifteen minutes and that he was, in fact, Mr. Preston was not stabbed with a butcher knife.

After that, he was stabbed. When Mr. Preston, the victim, got out of his car, the Defendant or who he identified as the Defendant, came over and his money fell out and he picked up the money and ran.

Mr. Lewis testified that the assailant had a regular haircut, was closely cropped hair, that the assailant announced this was a stick-up which didn't happen in the second case.

And then, pulls out the jack-knife, not the butcher knife, a smaller knife. He did not stab Mr. Lewis. He didn't make an attempt to stab Mr. Lewis.

He asked him for the money. He took the changer that was in the cab. Then, when Mr. Lewis jumped out of the car, the assailant jumped out of the car. Then, Mr. Lewis jumped back in the car and was able to drive off.

I think those are big differences. When I argue here whether or not the State could have got it in, perhaps, I don't think they could have.

Let's say if Mr. Lewis had identified the Defendant as being the perpetrator of the second act.

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I think the defense would have a good argument to the effect that these were distinct crimes. They were distinct crimes.

There were too many holes to bring in a modis operandi and under the Florida Williams rule type evidence, it was irrelevant. It was not probative.

The key is that Mr. Lewis could not identify the Defendant as not being the person or could not identify somebody else as definitely being the person who robbed him. That's a big difference between all the cases cited by the Petitioner where you have definite direct evidence or very strong circumstantial evidence.

For instance, in one of the cases you had in which the third person was found with bate money after the robbery. That's direct evidence to show that this other person committed the robbery. You don't have that here either.

It's the State's position again that --

THE COURT: Let me just ask, before we go on to the second point, let me ask you these questions.

The Public Defender is permitted to call Mr. Lewis and the following occurs:

"Were you asked by a young black male of approximately -- physical descriptions -- to drive from the VA Hospital to 61st Street

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and 21st Avenue, on that night?"

"A. Yes."

"Q. During that ride, were you accosted with a knife and robbed?"

"A. Yes."

"Q. Were you thereafter shown what you now know to have been a picture of the present Defendant, Mr. Hutchins? Did you at that time identify him as the man who had robbed you?"

"A. Yes."

"Q. Did you come to recognize thereafter that your identification was a mistake?"

"A. Yes.

MS. HERSHOFF: Your question, Your Honor?

THE COURT: Counsel says that under reverse Williams, that is probative evidence which a jury could choose to credit as tending to exculpate the defendant on the crime charged just as if the answer had been, "Yes, I identified him as I continued to believe that he was the person we were awaiting trial on this case." What have you.

The State would offer that as evidence of similar acts.

MS. HERSHOFF: It is the State's position, initially,

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that number one, that proffer that Your Honor has just stated would not be enough for a Williams modis operandi exception which requires some sort of hallmark in identifying some sort of unique feature. That is our initial position.

THE COURT: Robbing a cab driver by threatening with a knife or use of a knife on the run between the same locations.

MS. HERSHOFF: Unfortunately, in Dade County as I believe Mr. Preston, the victim in this case testifies that he had been robbed and stabbed before.

THE COURT: Yes.

MS. HERSHOFF: It's obviously not that unusual, unfortunately, in Dade County and on the run to the VA Hospital or that area of town, for that to happen.

As I said, it's unfortunate. I don't think it would bring up under the Williams rule.

The State submits that Mr. Lewis' testimony was not that clear and not probative because he would not be able to specifically have said the Defendant did not do it. And would not have been able to point out anybody as being the person. He just didn't know who did it.

There was certainly cause to think if he had gotten up on the stand, unfortunately, it may be

Mr. Hutchins was the one who did it.

THE COURT: I am not at this time persuaded by Mr. Scherker's argument, although I am closer to that point than I was before this afternoon.

Tell me about the other point which I must tell you I find at the moment arresting, that's the continual reference by Detective Shipes and the other police officer at the permission of the court, that continuing reference by the police officers and the repeat reference by the prosecutor to the assistance which had been furnished the police by a young black male who obviously had purported pointed out to the arresting officers the person whom they should investigate and arrest.

And because they had promised him anonymity would not be identified and was never produced. I really think it extraordinary that a trial court allowed the recitations which the record demonstrates to go to the jury.

So, it dissuades me from that one.

MS. HERSHOFF: Initially, Your Honor, I don't think we should blame the trial court because at the time of the trial that type of evidence was not considered hearsay.

And under Florida law, two cases I've cited,

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Collins vs. State, 65 So. 2d, 61 and Kirby vs. State which is 44 Florida 2d, 81 Southern, 836, which clearly states that it was proper for an officer to testify what he did pursuant to information, but could not relate the information itself because that was hearsay.

In this case none of the officers testified to any statements that this unknown black male said, It was just that we talked.

As a result, we did so and so.

The State recognizes it now under a Potelle (phonetic) Case which has come down from the Third District cited by Petitioner in his brief, that would be hearsay.

But at the time of this trial in 1976, it was not hearsay. It was not recognized as hearsay in the State of Florida.

I think it has to be taken into consideration the trial court's ruling. I don't think the trial court would be able to proceed six or seven years later. The Third District would change its mind. Perhaps, they shouldn't be because the Florida Supreme Court cases.

I say the Potelle Case law is the law now. It was not the law in Florida at the time of the trial. I don't think the trial court should be faulted.

THE COURT: I'm concerned with the confrontation law

which was on the law in 1976.

MS. HERSHOFF: That's correct. To be perfectly honest with you, Your Honor, from my memorandum, I did not go that much into merits on this.

THE COURT: You suggested in the most recent memorandum that viewed now in retrospect it was an erroneous equivalent of hearsay, but you suggest that it did not raise to the level, the constitutional level, under California vs. Green and other cases.

MS. HERSHOFF: That is our position. One of the factors that the Fifth Circuit in Favre vs. Henderson, 464 F. 2d, 359 cited by the Petitioner, which was based on Gutton vs. Evans, 400 US. 74, 91 Supreme Court, 200, you look at different factors to determine testimony, hearsay testimony violation.

One of those is the defendant has the ability to subpoena this confidential informant or this person to trial.

THE COURT: How do you apply that test here?

MS. HERSHOFF: It's the State's position, as the record shows, even though there was photographs at a pre-trial hearing, sometime during the volunteering, I believe it was in there, one of the circuit courts said that they could not get the name of the informant, however, there was a trial court in this case.

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Judge Nesbitt specifically said and the State said if you had tried the motion and you had ordered us, we would have considered having the police officer divulge that information, that then you would have deposed him, could have brought him to trial, you could have confronted him.

THE COURT: How was the defendant to know whether the pre-trial ruling was to the contrary and whether the representation by the prosecutor to Judge Nesbitt was that the police officer had promised anonymity to this assailant and according to the prosecutor, had told him flatly or her, as the case may be, that under no circumstances would they ever disclose the name?

MS. HERSHOFF: Because, Your Honor, what had happened at the pre-trial was a different trial judge then the judge that heard the trial.

I don't know whether defense counsel was precluded from at least trying to get that name that whether or not a police officer would have risked contempt and put him in jail for this unknown black informant. We don't know.

But I think the point is he didn't try. That's what the court based its ruling on.

THE COURT: It even appeared to me in reviewing through the trial record that the prosecutor had violated

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MS. HERSHOFF: 'I t
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hat may or may not be the rules
right?
understand that, Your Honor, but
- it's one thing when we're
trial court error. There were

other courts that upheld the trial court back in 1976, I think. The law has perhaps evolved a little bit different up to now. It was not perhaps as strong as it was back there.

Favre vs. Henderson was on the books at that time. That was to the Third District. Favre vs. Henderson was not cited by the defendant in his brief in any part to the Third District.

Perhaps if it had b en cited we would have a confrontation clause. I won't get into that.

THE COURT: I simply have found against you on those arguments.

MS. HERSHOFF: It is the State's position that the testimony of the witness in this case was sufficiently- was overwhelming. I understand the Defendant does not agree with that. We think that the --

THE COURT: Let me hear from Mr. Sherker on that.

Your argument, even if this is error, this was reversible error? It's not Constitution magnitude because the evidence of guilt established through the jury's opportunity to believe the cab driver was sufficient to convict.

If that evidence was as strong as you characterize it to have been, it's a shame that the procedures were tainted by the repeated reference to the nameless

accuser. Nameless accusers don't have an appropriate rule under the confrontation clause.

Let me hear Mr. Scherker on your last point.

MS. HERSHOFF: Thank you, Your Honor.

MR. SCHERKER: Judge, I believe the question of prejudicial error is answered by Favre itself.

In that case there were --

THE COURT: By which Favre?

MR. SCHERKER: Favre vs. Henderson, the decision upon which we primarily rely and which holds that any distinct decision, distinct action between throughout the essence and actuality.

THE COURT: I don't have any problem with that. It's clear that the jury was asked by the prosecutor to believe that the officer had been accurately assisted by an informant who knew the guilt of the defendant, but did not want himself to be disclosed.

I don't have any problem with that.

MR. SCHERKER: Favre also addresses the issue of harmless error.

THE COURT: Let's look to that.

MR. SCHERKER: In Favre, there were four witnesses who saw the robbery, all of whom identified the defendant in a police line-up fifteen days after the robbery.

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It was argued at trial that there was some doubt about the validity of the line-up identification. That's apparently argument of counsel about the placement of the line-up.

At trial, one of the witnesses said he could not make a positive identification, but thought the defendant was the robber. Another witness made a positive identification. Another witness said he couldn't say. He made an identification at trial, but he couldn't see his face completely to make a real positive identification. And the fourth witness said she saw the robber's face completely at the time of the incident. Saw his face perfect and identified the defendant as the robber without doubt.

Those were the facts in Favre vs. Henderson. That was the State's evidence in Favre vs. Henderson. What the court held is that, "Considering the disputed testimony in context, we cannot conclude that its admission was harmless beyond a reasonable doubt. The testimony with its inference on the issues of identification and guilt --" the same inference we have in this case -- "may well have tipped the scales towards a guilty verdict. Without, the disputed testimony, the prosecution had a questionable case --"

But is that true here?

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MR. SCHERKER: Judge, if one positive identification is not overwhelming evidence, they had one undisputed, unshaken positive identification.

In Favre vs. Henderson, three corroborating identifications.

THE COURT: In this case, how shaky is the case without reference to --

MR. SCHERKER: I go back to the time of the initial identification. It's well known that the first identification of the individual is of primary importance in subsequent identifications.

The first identification of Michael Hutchins was made under terms at least questionable and, perhaps, stated more strongly, highly suspect circumstances.

The individual was in a hospital, had been severely injured, was under sedation, thought he saw two sheets of photographs which, in fact, he saw one.

Thereafter, continued to identify Michael Hutchins every time he came to court, providing a very strong basis for the argument that he was wrong at the time and that he naturally stuck to that identification.

If there had been one eyewitness, one strong eyewitness identification, one positive eyewitness identification, Favre vs. Henderson would have gone the other way and it didn't.

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What they held was with the disputed testimony, the prosecution's case was far stronger and the test, of course, is harmless beyond a reasonable doubt. There was no doubt that the prosecution's case was far stronger, based on his ability to argue to the jury unchecked that Michael Hutchins was essentially identified by this unknown witness.

Now, what the prosecutor tells the jury -- I'm referring to his closing argument -- if that was even necessary, but the police officers were allowed to testify to what this unnamed person who took them to 1840 Northwest 60th Street and then, they went and made up an investigation. And then, they got the photographic identification and Michael Hutchins was identified from that photographic identification.

And then, they went and arrested Mr. Michael Hutchins.

Where did they arrest Michael Hutchins? At the same address, 1840 Northwest 60th Street.

We submit if there was any question of harmless error, it's obviously vacated by the facts of the case, the fact of the crime itself, the fact that the witness' identification and by the prosecutor's argument.

If the prosecutor didn't draw those inferences

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for the jury, they might have been able to argue, well, it's kind of unclear from the record, the jury might have gone right by it.

But what did the prosecutor do in his closing argument? Then, afterwards, the detective got out a warrant and went to the State Attorney's Office and went to the judge and got a warrant for Michael Hutchins' address. Went back to that address and where was the address? 1840 Northwest 60th Street.

It was at that point that the prosecutor continued by telling the jury that they were only hearing the tip of the iceberg and urged them not only to rely on what you heard here, but to consider all the evidence and circumstances involved in this crime.

THE COURT: That was a very unfortunate allusion.

MR. SCHERKER: The prosecutor didn't think his case was as strong as the State says it is today under that one identification made under circumstances that were subject to question by a reasonable jury.

That, as I said, in Favre vs. Henderson, we have none of these factors. In Favre vs. Henderson, we have just the testimony of numerous witnesses with varying degrees of certainty. One who is absolutely positive. What I draw from that one positive ID is not overwhelming evidence. There is no corroborating

evidence whatsoever in this case.

Urged the jury to convict on testimony which could not be cross examined on, a witness who could not be confronted is prejudicial error and it does warrant issuing a writ.

THE COURT: I find that the State's claim now that the question we have just been considering is not before the Court.

As I've said earlier, I reject it. I find that it is -- I'm not certain with regard to what we can characterize as the reverse Williams argument. I find that the repeated reference before the jury to a person not particularized so that the defense might have called him or confronted him, if called, was error.

I'm not certain whether it was error that requires now a new trial or discharged under constitutional standards. I'm uncertain because of the State's argument that this is a case in which all of those references may be deleted from the record and there is sufficient and untainted evidence to support the conviction.

That is to say, the testimony of the cab driver.

If the State wants to file anything with me in the next fifteen days on that point. Counsel may feel that the matter has been briefed and memoed sufficiently. I don't want to suggest that that's not so.

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I'm not suggesting that these issues have not received a lot of attention from counsel.

If the State wants to file anything on that point, it may do so within the next fifteen days, which would put us essentially in the middle of December.

If you want to respond on that point, only do so full within say the following twenty days.

MR. SCHERKER: Yes, sir.

THE COURT: Which would put us approximately to the 5th of January. And I will publish my findings, recommendations to the District Court as soon thereafter as I can. I want to thank counsel for assisting me, in particular Mr. Scherker for having accepted a reappearance on behalf of Mr. Hutchins.

MR. SCHERKER: Thank you, Judge.

(Thereupon, the hearing was concluded.)

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CERTIFICATE

STATE OF FLORIDA)

COUNTY OF DADE)

I, Leslie Walls, Court Reporter and Notary Public in and for the State of Florida at Large, do hereby certify that the foregoing transcript, pages 1 through 44, is a true and correct transcript of the proceedings had in the above cause of MICHAEL HUTCHINS vs. LOUIE L. WAINWRIGHT, Case 82-0420 CWJE, heard before the Honorable Peter L. Nemkoff, on November 29th, 1982.

Dated at Miami, Dade County, Florida, this 22 day of December, 1982.

Leslie Walls

My Commission Expires 3/4/83

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ARGUMENT

I

THE DISTRICT COURT ERRED IN FINDING THAT THE RESPONDENT WAS ESTOPPED FROM SEEKING DISMISSAL OF THE PETITION FOR WRIT OF HABEAS CORPUS ON THE GROUNDS OF RES JUDICATA, EQUITABLE ESTOPPEL, AND WAIVER.

In his petition for writ of habeas corpus filed in 1978, among the grounds alleged by the Petitioner was that his conviction was "obtained by the unconstitutional act of letting hearsay evidence in favorable only to the prosecution by the court," "where the witness said that he returned to car, and there was a piece of paper in that car with some writing on it and that when he got back to the office, he made a phone call to another person and this person told him something and then took him to 1840 N.W. 60th Street, the defendant's home. When none of this can be said really happened." See Exhibit "C" at p.5. The district court, held that the Petitioner had raised the substantial equivalent on this issue on direct appeal to the Third District Court of Appeal of Florida. However, because, the petition contained clearly unexhausted claims, the petition was dismissed without prejudice so that the Petitioner could exhaust his state remedies.

In the present Petition for Writ of Habeas Corpus, the Petitioner alleged as his second ground for relief that his "conviction was obtained by the unconstitutional act of allowing 'hearsay evidence' to be admissible," "where witness said that he was told by some 'unknown person' to the prosecutor or defense something" and this person left a note, none of this was or can be proved as fact." (R.5). In its initial motion to dismiss, the respondent, initially conceded that this claim had been presented to and rejected by the Florida appellate court, but submitted that the petition should again be dismissed because it contained other unexhausted claims. Soon, thereafter, upon order by the Magistrate (R.23), counsel for the Petitioner entered his appearance, filed a Notice of Election of Remedies, and revised the claim into constitutional terms to state "the admission into evidence of the substance of incriminatory out-of-court statements attributed to an unnamed and undisclosed informant violated the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States." (R.27-34).

After being allowed to file a memorandum on the merits of the remaining claims, the Respondent realized that he had erroneously conceded that the confrontation clause claim had been previously presented to the state appellate court. In

order to correct the error, the Respondent, in his responsive memorandum filed on November 22, 1982, alleged that the confrontation clause claim had not been fairly presented to the state courts and because it could probably not be raised in a state motion for post-conviction relief, it was waived pursuant to Engle v. Isaac, supra and Wainwright v. Sykes, supra. However, the Respondent noted that if it was possible for the Petitioner to raise this claim in the state courts, then he has not exhausted his state remedies, and the state courts should be given an opportunity to apply the controlling legal principles.

At the oral argument on November 29, 1982, counsel for the Respondent attempted to explain the reasons for not initially raising the procedural issues, and again asserted that the Petitioner had raised a Fifth Amendment, due process claim, the right to a fair trial, and not a Sixth Amendment, confrontation clause claim in his direct appeal to the State appellate court. The Magistrate then decided that the claim was properly before him, stating in his written report that the Respondent was estopped from asserting its procedural claims under the doctrines of res judicata, equitable estoppel and waiver, and further that the confrontation clause claim had been substantially presented to the state appellate court. Because the district court adopted the Magistrate's report, these

findings, will now be discussed in terms of the district court's findings.

Respondent's submits that the district court's findings of collateral and equitable estoppel are without reason or legal support. It is well established that the principles of res judicata and collateral estoppel are inapplicable to habeas corpus proceedings. Smith v. Yeager, 393 U.S. 122, 124 (1968); Thomas v. Dietz, 518 F.Supp. 794, 799 (D.N.J. 1981). The instant case does not involve double jeopardy principles as was involved in Ashe v. Swenson, 397 U.S. 436 (1970), Johnson v. Estelle, 506 F.2d 347 (5th Cir. 1975) or McDonald v. Wainwright, 493 F.2d 204 (5th Cir. 1974) cited in the Magistrate's report. Rather, the issue is whether the order by the district court in the first petition constituted a final judicial determination which would preclude the Respondent from raising the procedural issues.

Respondent submits that the district court's order in the first petition was not a final order that would be res judicata and preclude the Respondent from raising the procedural issues before this Court. The order was not a final order unless it was one that could be appealed. 28 U.S.C. §2253 provides that only final orders are subject to review on appeal. A final decision generally is one which ends litigation on the merits and leaves nothing for the

court to do but execute the judgment. Catlin v. United States, 324 U.S. 229 (1945). An order contemplating further proceedings in the lower court is not final, regardless of the form in which it is rendered. Smith v. Sherman, 349 F.2d 547, 552 (8th Cir. 1965).

To determine whether the district court's order in the first petition was appealable, so as to estop the Respondent from raising its procedural arguments, the Respondent asserts that this Court must look to the Federal Rules of Civil Procedure. Rule 81(a)(2) of the Federal Rules of Civil Procedure are applicable to habeas corpus proceedings to the extent that the practice in such proceedings is not set forth in the statutes of the United States and has heretofore conformed to the practice in civil actions. Under Rule 54(b) of the Federal Rules of Civil Procedure, when more than one claim for relief is presented in an action, the court may direct the entry of a final judgment as to one or more but fewer than all claims only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment. In the absence of such a determination and direction, the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all parties. (Emphasis added). Thus, under the express terms of the rule, a

decision which adjudicates less than all of the claims does not terminate the action as to any claim and the order is subject to revision at any time before the adjudication of all claims. Stewart v. Bishop, 403 F.2d 674, 680 (8th Cir. 1968).

In Collins v. Miller, 252 U.S. 364 (1920), the Supreme Court held that a habeas corpus appeal lies only from a final judgment. The Court held that a trial court's order that a petitioner's habeas corpus petition should be denied on one of the claims, but the other two claims were to be remanded for further hearing, was not a final decision, and hence unappealable. The Court stated:

> "A case may not be brought here by appeal or writ of error in fragments. To be appealable the judgment must be not only final but complete.
>
> * * *
>
> And the rule requires that the judgment to be appealable should be final not only as to all parties but as to the whole-subject matter and as to all the causes of action involved.
>
> * * *
>
> Only one branch of the case has been finally disposed of below, therefore none of it is ripe for review by this court."
>
> 252 U.S. at 370, 371.

Respondent submits that because the first petition had multiple claims and was dismissed without prejudice,[5] it was not a final judgment that could be appealed by the Respondent under 28 U.S.C. §2253. Thus, the Respondent should not be collaterally estopped from raising the procedural issues in the instant petitions.[6] See, e.g., Garcia v. United States Board of Parole, 557 F.2d 100, 104 (7th Cir. 1977); Watts v. United States, 402 F.2d 676, 685-86 (D.C. Cir. 1968) rev'd on other grounds 394 U.S. 705 (1969).

In addition, it is illogical to require the respondent who has received a favorable disposition, that is, a dismissal without prejudice, of the petition, to waste the appellate court's time, to appeal one issue of a multi-issue petition. This is especially true, where the dismissal was without prejudice, allowing the petitioner to refile and reallege the same claims. The interests of judicial economy would be greatly disserved by requiring the respondent in a habeas corpus case to appeal orders dismissing the petition without prejudice, or be collaterally estopped from raising procedural issues in a subsequent petition.

[5]It can hardly be said that it is equitable for only the Respondent to be subject to prejudice and the Petitioner.

[6]It should also be noted that the district court has treated the instant petition as a separate and distinct case. This is evidenced by the different case numbers and different judges.

Respondent also objects to the district court's finding that the Respondent is equitably estopped from raising his procedural claims on the grounds that the Petitioner justifiably and detrimentally relied upon the Respondent's initial concession. Respondent submits that any unexhausted claims which Petitioner abandoned can be reinstated. Thus, Petitioner would have suffered no detrimental reliance. However, the Petitioner would again have a mixed petition of exhausted and nonexhausted claims and the petition would have to be dismissed again without prejudice. Rose v. Lundy, ___U.S.___, 102 S.Ct. 1198, 1199 (1982); Galtieri v. Wainwright, 545 F.2d 942 (5th Cir. 1977).

Respondent would also submit that although a custodian in a habeas corpus proceeding may be held to have waived procedural objections to the consideration on merits, Felder v. Estelle, 693 F.2d 549 (5th Cir. 1982); Lamb v. Jernigan, 683 F.2d 1332 (11th Cir. 1982); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), waiver is not applicable in the instant case. Respondent has raised the procedural issue before the Magistrate, the Petitioner was given an opportunity to respond (See Transcript of Hearing at 5-14; R.87-131, and the Respondent objected to the Magistrate's finding that the merits of the petition were properly before him. This is not a case where the Respondent has raised the procedural issues for the first time on appeal, Messelt v.

Alabama, 595 F.2d 247 (5th Cir. 1979), nor has there been a great deal of expenditure of federal judicial resources. Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978). Rather, the Respondent has timely raised the procedural issues, and has not waived those arguments. See, e.g. Hopkins v. Jarvis, 613 F.2d 568, 570 n.2 (5th Cir. 1981); Bufalino v. Reno, 613 F.2d 568, 570 n.2 (5th Cir. 1980). Respondent asserts that the district court's reliance on LaRoche v. Wainwright, 599 F.2d 722 (5th Cir. 1979) as support for its finding that the respondent has waived his procedural claims is misplaced. Rather, LaRoche supports the Respondent's position that he is not barred by waiver or estoppel from raising the procedural issues. In LaRoche, the court held:

> We need not reach the state's procedural arguments because they have been waived here by the failure to raise them, either in the first federal habeas proceeding that was dismissed for failure to exhaust state remedies or in the second habeas proceeding below, after LaRoche had been denied relief by state courts. 599 F.2d at 724.

Although, the Respondent failed to raise the procedural issues in the first federal habeas proceeding that was dismissed for failure to exhaust state remedies, Respondent has raised the procedural issues in the present habeas proceeding. Therefore, under LaRoche, Respondent is not estopped and has not waived his right to raise those pro-

cedural issues in the present petition. Thus, the Respondent submits, the district court erred in finding that the Respondent was estopped from seeking dismissal of the petition for writ of habeas corpus on the grounds of res judicata, equitable estoppel, and waiver.

II.

THE DISTRICT COURT ERRED IN FINDING THAT THE PETITIONER'S CONFRONTATION CLAUSE CLAIM HAD BEEN SUFFICIENTLY PRESENTED TO THE STATE APPELLATE COURTS, WHERE THE CLAIM WAS PRESENTED IN ONLY STATE TERMS, AND WAS FRAMED IN TERMS OF PREJUDICIAL PROSECUTORIAL COMMENTS, AND NOT IN TERMS OF A SIXTH AMENDMENT CONFRONTATION CLAUSE VIOLATION.

The Respondent strenously submits that the district court erred in finding that the substantial equivalent of the confrontation claim was presented to the state appellate courts. Because the state appellate opinion was a per curiam affirmance without a written opinion, Hutchins v. State, 349 So.2d 1237 (Fla. 3d DCA 1977), this Court must look to the state appellate briefs to determine whether the substantial equivalent of the confrontation claim was presented. The issue on direct appeal was framed as follows:

> Whether the trial court erred in allowing prosecutorial comments regarding the investigating officers' encounters with an unidentified third person to pervade the entire trial, where the only purpose of this argument was to lead the jury to draw the impermissible inference that this third person had identified the defendant as the perpetrator of the charged crime, but was afraid to testify in court.
>
> See Exhibit "A", Point II on Appeal, at 11.

In support of this allegation of error, the Petitioner cited state cases that admonished prosecutors from making comments that could not be reasonably inferred from the evidence or which was inflammatory and calculated to raise passion or prejudice in the minds of the jury. See Exhibit "A", Brief of Appellant at 22-24. None of these cases contained any reference to any confrontation clause claims.[7]

It is obvious that the actual gist of Petitioner's allegation of error was that the prosecutor's arguments were based on evidence not before the court at all and if it was

[7]Adams v. State, 192 So.2d 762 (Fla. 1966)(comments by prosecution that equated victim of homicide to wives and relatives of jurors, and that defense counsel's statements "perverted and distorted things" and "violated his oath as a lawyer and human being "were unduly prejudicial and constituted error); Goddard v. State, 143 Fla. 28, 196 So. 596 (1940)(prosecutor's statements that defendant was "low down scoundrel" and "skunk" and there has never been an ounce of remorse in the "no good black heart of that scondrel"; although improper, held not reversible in light of overwhelming evidence); Johnson v. State, 88 Fla. 461, 102 So. 549 (1924)(prosecutor's reference to the defendant that he "went out there for what cats and dogs fight for," and "is a brute", were reversible error); Richardson v. State, 335 So.2d 835 (Fla. 4th DCA 1976)(prosecutor's remarks that he "could have brought in a lot of police officers" and that case could have lasted longer constituted reversible error); James v. State, 334 So.2d 83 (Fla. 3d DCA 1976)(prosecutor's remark that pushers infest other individuals with his disease of heroin although improper, was not so prejudicial as to require a mistrial); Silvestri v. State, 332 So.2d 351 (Fla. 4th DCA 1976)(prosecutor's remark that the state's key witnesses were "obviously able to convince the police of their truthfulness or they would have been the ones on trial was prejudicial error); Thompson v. State, 318 So.2d 549 (Fla. 4th DCA 1975)(prosecutor's comment, concerning additional witnesses who could of been called were prejudicial in that they lead the jury to believe that there was other evidence).

a constitutional violation, it was a violation of his rights not to be deprived of life, liberty or property, without due process of law under the Fifth Amendment of the United States Constitution. This can be determined by reviewing the portions of the prosecutor's arguments emphasized by the Petitioner in his brief. The Petitioner was especially concerned with the prosecutor's explanation as to why the young black male did not testify, and his request to the jury to not only rely on what they heard, but to consider all the circumstances. See Exhibit "A", Appellant's brief at 21, 23. Respondent submits that if the Petitioner had intended to raise the issue in terms of a confrontation clause violation, he most certainly would have done so. Petitioner was able to frame his first issue on appeal, that the trial court erred in excluding a defense witness, as a basis for a violation of the Petitioner's due process right to prepare and present a defense under the Sixth and Fourteenth Amendments to the United States Constitution. See Exhibit "A", Appellant's Brief at 12.

Further evidence that the Petitioner did not raise the substantial equivalent of a confrontation claim in the state appellate court, is found by reviewing the state's brief. The state argued in its brief that the prosecutor properly argued the facts which were established at trial and which were reasonably inferred from the facts established. The

state cited to the portions in the transcript in which the two officers testified about their contact with the young black male. See Exhibit "B", Appellee's Brief at 17-20. The state also argued that trial counsel "never moved for a mistrial or asked the trial court to take any action during the prosecuting attorney's argument or at the conclusion thereof" thus, he did not properly preserve his assertions regarding the prosecutorial arguments for appeal. See Exhibit "B", Appellee's Brief at 27. Thus, it is obvious that the state was not put on notice that the Petitioner was raising a violation of the confrontation clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.

Respondent submits that it is evident that the Petitioner did not raise the substantial equivalent of a confrontation clause claim in the state courts. Although, a hearsay objection may be sufficient to raise a confrontation issue if raised in a confrontation posture, Thomas v. Estelle, 582 F.2d 939 (5th Cir. 1971) such an objection was not presented on the appellate level in the instant case. See Dave v. Attorney General of State of New York, 696 F.2d 186, 193 (2d Cir. 1982)(en banc).

In Thomas v. Estelle, supra, the hearsay objection was made in terms that indicated that the defense counsel wished the witness to be brought down to the courtroom so he could question her. In the instant case, although the Petitioner's trial counsel objected to the testimony on hearsay grounds as well as complaining that he was never given an opportunity to discover the young black male's identity, Petitioner's appellate counsel chose to frame the issue on appeal only in terms of what the prosecutor said concerning the young black male and his reasons for not being a witness, in his closing argument. Not only did Petitioner's appellate counsel not phrase the issue in terms of a confrontation clause violation, he did not even allege that there was a violation of the hearsay rule.[8]

Respondent submits that the district court's finding that the substance of the confrontation claim was presented to the state appellate court is clearly in error. It is well established that under 28 U.S.C. §2254, a federal habeas petitioner is required to have provided that state courts with a "fair opportunity" to apply controlling legal principles to the facts bearing upon his constitutional

[8]This is because at the time of the Petitioner's trial the officers' testimony as to the manner in which they investigated the case, testifying what they did, pursuant to information (not related in court) received from the informant, was permitted in Florida courts as not being hearsay. Collins v. State, 65 So.2d 61 (Fla. 1953); Kirby v. State, 44 Fla. 81, 32 So. 836 (1902).

claim. Picard v. Connor, 404 U.S. 270, 276-277 (1971). Furthermore, the habeas petitioner must have "fairly presented" to the state courts the "substance" of his federal habeas corpus claim. Picard v. Connor, 404 U.S. at 275, 277-278. It is not enough that all facts necessary to support the federal claim were before the state courts or that a somewhat similar state law claim was made. Anderson v. Harless, ___U.S.___, 103 S.Ct. 276, 277 (1982). The argument raised in federal court must be the substantial equivalent of that presented to the state courts "to insure that the 'method of analysis' was "readily available to the state court." Santana v. Felton, 685 F.2d 71, 74 (3d Cir. 1982).

Where a petitioner, on his direct appeal to the state appellate court, presented his claims in state terms only, the petitioner has failed to give the state courts a fair opportunity to consider his federal claims of error. Gulliver v. Dalsheim, 687 F.2d 655, 657 (7th Cir. 1982); Santana v. Fenton, supra; Steele v. Taylor, 684 F.2d 1193, 1206 (6th Cir. 1982); Winfrey v. Maggio, 664 F.2d 550, 553 (5th Cir. 1981); Hart v. Estelle, 634 F.2d 987, 989 (5th Cir. 1981); Thomas v. Wyrick, 622 F.2d 411, 413 (8th Cir. 1980); Conquest v. Mitchell, 618 F.2d 1053, 1056 (4th Cir. 1980); Johnson v. Metz, 609 F.2d 1052, 1054 (2d Cir. 1979).

Alleging lack of a fair trial does not sufficiently alert a state court to a contention that the trial court failed to comport with due process guarantees. Kirksey v. Jones, 673 F.2d 58, 59-60 (2d Cir. 1982); Thomas v. Wyrick, supra at 413; Johnson v. Metz, supra at 1054-1055. A habeas petitioner will not be deemed to have fairly presented his claim to the state courts though the prior state proceedings technically asserted the same constitutional deficieny, the same facts that are urged in the federal court, are used to support of a different legal theory. Hart v. Estelle, supra at 989. See also Picard v. Connor, supra (claim in state court that indictment was amended in such a way as to violate the Fifth Amendment, was not sufficient to apprise the state courts of a violation of the Equal Protection Clause of the Fourteenth Amendment). Furthermore, a defendant's citation to a state court decision predicated solely on state law will not be sufficient to fairly apprise a reviewing court of a potential federal claim merely because the defendant in the cited case advanced a federal claim. Anderson v. Harless, supra, 103 S.Ct. at 278, n.3.

The Respondent submits that where the Petitioner in his brief to the state appellate court presented the facts, but framed the issue on appeal in terms of prejudicial prosecutorial comments, and not in terms of whether the

testimony of the police officers concerning the young black male was hearsay and violated his right to confrontation, or even whether the prosecutors comments by themselves were hearsay or violated the petitioner's right to confrontation, the "substance" of his confrontation claim was not fairly presented to the state courts.

The lack of citation to federal constitutional provisions and federal authority in the Petitioner's appellate brief must be given greater weight by this Court than the district court did. This is because it is well established that because evidence is admitted in violation of the hearsay rule, it does not lead to the automatic conclusion that a defendant's confrontation rights have been violated. California v. Green, 399 U.S. 149, 156 (1970). See also Daye v. Attorney General of State of New York, supra. If Petitioner's state appellate counsel had intended to raise a confrontation claim, he could of cited the two Fifth Circuit cases, United States v. Ragano, 476 F.2d 410 (5th Cir. 1973) and Favre v. Henderson, 464 F.2d 359 (5th Cir.), cert. denied, 409 U.S. 942 (1972), as he did in his memorandum in support of petitioner's writ of habeas corpus. Thus, Respondent objects to the Magistrate's finding that the substantial equivalent of the present confrontation claim was raised in the state appellate court.

Respondent submits that this failure to fairly present this issue to the state courts is not one of non-exhaustion,[9] but rather one of waiver under the doctrine of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977). In Wainwright, the United States Supreme Court held that, failure to make a timely objection under Florida's contemporaneous objection rule to the admission of his inculpatory statements, absent a showing of cause for the noncompliance with the procedural rule and some showing of actual prejudice, bars federal habeas corpus review of the defendant's Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966) claim. This cause and prejudice requirement of Wainwright v. Sykes, has been extended to include claims which the defendant has failed to include on direct appeal in compliance with state procedural appellate requirements. See, e.g., Wright v. Bombard, 638 F.2d 457 (2d Cir. 1980); Forman v. Smith, 633 F.2d 1055 (4th Cir. 1980); Evans v. Maggio, 557 F.2d 430 (5th Cir. 1977); Cole v. Stevenson, 620 F.2d 430 (5th Cir. 1977); Carter v. Scully, 533 F.Supp. 257 (S.D.N.Y. 1982). Furthermore, issues presented in the state trial court but not presented to the appellate court are

[9]The respondent is asserting that the Petitioner has waived this claim, but if this Court finds there has been no waiver because the Petitioner still has a state remedy, then respondent asserts in the alternative, that this claim is unexhausted. See, e.g. Rose v. Lundy, ___U.S.___, 102 S.Ct. 1198 (1982); Pitchess v. Davis, 421 U.S. 482, 98 S.Ct. 1748 (1975); Picard v. Connor, supra; see also Gulliver v. Dalsheim, supra; Share v. Iowa, 581 F.2d 727 (8th Cir. 1978).

deemed abandoned. Gorham v. Wainwright, 588 F.2d 178, n.2 (5th Cir. 1979); Galtieri v. Wainwright, 582 F.2d 348, n.8 (5th Cir. 1978); Gardner v. Blackburn, 569 F.2d 856 (5th Cir. 1978); Sneed v. Blackburn, 569 F.2d 854 (5th Cir. 1978); O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977); Henzel v. Florida, 475 F.2d 1271 (5th Cir. 1973).

Respondent submits that Wainwright v. Sykes, is applicable to the instant case because under state procedural rules, the Petitioner would be precluded from raising the confrontation clause issue on collateral review. See, e.g., Engle v. Isaac, ___U.S.___, 102 S.Ct. 1558, 1570 n.28 (1982). Under Rule 3.850 of the Florida Rules of Criminal Procedure, the Petitioner would be precluded from raising this issue, because it is a matter which could have been raised on direct appeal. Florida courts have consistently held that issues which could have been raised on direct appeal from the conviction will not support a subsequent collateral attak by way of a motion for post-conviction relief. See, e.g., Alvord v. State, 396 So.2d 184, 191 (1981); Adams v. State, 380 So.2d 423, 424 (Fla. 1980); Harvey v. State, 383 So.2d 770, 771 (Fla. 3d DCA 1980). Thus, Respondent submits that because Petitioner's confrontation clause claim is foreclosed from state review due to procedural default, this Court must reverse the district court and dismiss the confrontation

clause claim absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation.

The Respondent further submits that the district court's finding that under Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982), it would have been futile for Petitioner's counsel "to have asserted error in the introduction of a ostensible nonhearsay testimony before a court which approved the prosecutor's reliance upon that testimony as evidence of guilt." (See Report of Magistrate at 10), (R.132-152), was error. Respondent submits that it may not of been futile for petitioner's appellate counsel to have raised the confrontation claim in the state court. Although, the alleged inadmissible evidence was not considered hearsay by the Florida courts at the time of the appeal, see footnote 8, supra, there were Fifth Circuit opinions which contrary to Florida law, held this type of testimony to be hearsay and a violation of the right to confrontation. See text supra at 38. It is not proper for federal courts to speculate as to what the State appellate courts would have done if properly presented with a confrontation issue. See, e.g. Engle v. Isaac, supra, 102 S.Ct. at 157-158 n.35.

Furthermore, district court's reliance on Henry v. Wainwright, supra, is misplaced. In Henry, the Court held that Engles v. Isaac, supra was inapplicable because the Florida courts had dealt with the defendant's claim on the merits, thus there was no procedural default, and that under Florida law it was not necessary for a party to continue to object, where all the parties had agreed that the trial court had overruled the objection and there was no need for counsel to belabor the point. 686 F.2d at 313-314 n.3 and 4. In the instant petition, the Petitioner's confrontation claim was never properly brought to the appellate court's attention. Thus, it is logical to assume that the appellate court may have found error based on the confrontation clause in the introduction of the out-of-court statements, if the claim had been properly brought before it. However, in the form that the allegation of error was made, that is, that the prosecutor improperly commented on evidence not before the jury, the state appellate court's resolution of the issue was proper.

The Respondent asserts that Petitioner has not shown any cause for his failure to raise the confrontation clause issue on his direct appeal to the Third District Court of Appeal. Any allegations that appellate counsel was ineffective for failing to raise the issue on direct appeal

must be rejected as insufficient reasons to satisfy the "cause" requirement. See, e.g., Washington v. Estelle, 648 F.2d 276, 278 (5th Cir. 1981); Lumpkin v. Ricketts, 551 F.2d 680, 683 (5th Cir. 1977). See also Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978)(en banc); Indiviglio v. United States, 612 F.2d 624 (2d Cir. 1979). It is not proper for federal courts to speculate on the possible reasons for a failure to follow procedural rules. Tyler v. Phelps, 643 F.2d 1095, 1100 (5th Cir. 1981). Furthermore, cause for a failure to follow state procedure cannot exist because the error "went to the central issue of guilt or innocence and infected the fairness of the trial itself." Tyler v. Phelps, supra, at 1101 n.9. Plain error cannot substitute for a failure to show cause. Engle v. Isaac, ___U.S.___, 102 S.Ct. 1558, 1575 n.43 (1982). Thus, Respondent submits that the Petitioner having failed to show cause, it is not necessary for this Court to determine if there was actual prejudice.[10] Therefore, the district court erred in considering the merits of the Petitioner's confrontation clause claim as grounds for federal habeas corpus relief. See, e.g. Washington v. Estelle, supra at 278.[11]

[10]Respondent asserts that any error that occurred with the admission of the hearsay testimony was harmless beyond a reasonable doubt. See text infra at 43-45.

[11]It should also be noted that it is not the respondent or the State of Florida's fault that the Petitioner after first filing his petition in 1978, waited until 1982, to refile after the first petition had been dismissed without prejudice.

III.

THE DISTRICT COURT ERRED IN FINDING THAT THE ERROR IN ADMITTING HEARSAY TESTIMONY IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Respondent submits that even if the state trial court committed error in permitting the testimony as to what they did pursuant to information received from the unnamed informant, the error should be deemed harmless beyond a reasonable doubt. Harrington v. California, 395 U.S. 250 (1969).[12]

[12]It should be noted that in Favre v. Henderson, 464 F.2d 359 (5th Cir. 1972), the Fifth Circuit delineated nine factors based on Dutton v. Evans, 400 U.S. 74 (1970), from which the court will review to determine whether the admission of hearsay testimony violated the defendant's Confronation Clause right. 464 F.2d at 364. The Respondent would submit that one important factor - that the out-of-court declarant could not have been subpoenaed by the defense is not present in the instant case. The trial court clearly pointed out the Petitioner had failed to file any motions for disclosure of the confidential informant, (SR.34), nor did the Petitioner move to have the officer produce the informant's name, although the Petitioner's counsel was told by the state that the court could order the officer to do so. (SR.35, 38-39). Thus, the Petitioner could have had the informant produced if he had so requested. This is not a case in which the state introduced an unidentified informant's statement at trial and at the same time used the confidential informant's privilege as a shield from disclosing his name. See, e.g., Styers v. Smith, 501 F.Supp. 880, 887 (W.D.N.Y. 1980).

In McAllister v. Brown, 555 F.2d 1277 (5th Cir. 1977), the Fifth Circuit held that although the testimony of a police officer that an unnamed informant reported that the Petitioner had claimed responsibility for an armed robbery, may have exceeded the outer limit on the use of hearsay evidence, such error was harmless. The only evidence cited by the Court was the identification of the petitioner by the two victims of the armed robbery from a photographic array, at a line-up and in court.

In the instant case, the victim, Wesley Preston, positively identified the Petitioner as his assailant on at least three different occasions. Preston positively identified the Petitioner on the day following the crime from a group of photographs shown to him at the hospital by Detective Shipes. (SR.61, 103-106). Preston again identified the Petitioner as his assailant at a preliminary hearing prior to trial (SR.63), and again at trial. (SR.56, 58). Preston testified that when the Petitioner entered his car, he "watched him pretty close," since he had been stabbed and robbed before. (SR.54, 56), and in fact, he and the Petitioner talked most of the way during the 15-20 minute ride, during which time Preston could observe the Petitioner. (SR.54, 55, 68, 69). Thus, the Respondent submits that any error was harmless, Chapman v. California, 386 U.S. 18 (1967).

CONCLUSION

Based upon the foregoing argument and citations of authority, the Respondent respectfully requests that this Court reverse the order of the district court granting the Petitioner's Petition for Writ of Habeas Corpus.

Respectfully submitted,

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Attorney General

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF OF RESPONDENT/APPELLANT was furnished by mail to ELLIOT H. SCHERKER, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Fl 33125, on this 19 day of May, 1983.

Penny Hershoff Brill

PENNY HERSHOFF BRILL
Assistant Attorney General

ph/

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-1102

LOUIE L. WAINWRIGHT,

Petitioner,

vs.

MICHAEL HUTCHINS,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Michael Hutchins, by and through undersigned counsel, moves this Court for leave to proceed in forma pauperis in the above-styled cause, pursuant to Rule 46.1 of this Court. Respondent has been adjudicated indigent and permitted to proceed in forma pauperis by the United States District Court for the Southern District of Florida. The affidavit of the respondent in support of this motion is attached hereto.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

BY: _____
ELLIOT H. SCHERKER
Assistant Public Defender

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OCTOBER TERM, 1983

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LOUIE L. WAINWRIGHT,

Petitioner,

vs.

MICHAEL HUTCHINS,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, MICHAEL HUTCHINS, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made below relating to my ability to pay the costs of prosecuting the cause are true.

I have been employed as a part-time mechanic for the past five months. My average weekly take-home pay is One Hundred and Thirty Dollars, half of which I give to my mother to assist with the payment of bills.

Prior to obtaining this employment, I had not been employed for the past nine years. I receive no other income from any source. I do not own any cash or checking or savings account. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Michael Hutchins.
MICHAEL HUTCHINS

Sworn to and subscribed before me
this 30 day of January, 1984.

Sam Katz
NOTARY PUBLIC
State of Florida at Large

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXPIRES OCT 10 1986
BONDED THRU GENERAL INSURANCE UND